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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1356.

F. H. AYERS AND J. R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 7, 1890.

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1 *Petition.*

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting.

Be it remembered that — a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the April term, A. D. 1890, Hon. Andrew P. McCormick, district judge, presiding, among other, the following proceedings were had:

UNITED STATES OF AMERICA:

Circuit Court of the United States, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting; Hon. Andrew P. McCormick, Dist. Judge.

Be it remembered that on the 25th day of June, A. D. 1880, that the defendant Frank Ayers and others filed their transcript of record and proceedings from the district court in and for the county of Bell, northern district, and State of Texas.

Cause numbered in the United States circuit court, at Waco, 34, and is in words, to wit:

(Endorsed, to wit:) U. S. circuit court, northern district of Texas. No. 34. A. E. Watson, plaintiff, *vs.* Frank Ayers and others, defendants. Trespass as well to try title as for damages. Filed in my office June 25th, 1880. J. H. Finks, clerk, by Wm. M. Sleeper, deputy.

Petition as follows:

THE STATE OF TEXAS, }
County of Bell. }

To the honorable district court of said county:

Your petitioner, A. E. Watson, who resides in the county of Falls, State of Texas, complains of John Anderson, who resides in the said county of Bell, and of Frank Ayers and John R. Hall, who are not residents of the State of Texas, all of whom are hereinafter styled defendants, and alleges that heretofore, to wit, on the first day of August, A. D. 1877, your petitioner was seized of the following-described tract or parcel of land, lying on Cottonwood creek, in the aforesaid county of Bell, containing one-third of a league and patented to the heirs of Walter W. Daws, dec'd, viz: Beginning at a stake, from which a hackberry marked B. T. D. brs. N. 36 E. 143 vrs.; thence S. 71 E., at 107 vrs. passes corner of the Kavanaugh survey, 3,767 vrs., a stake in west line of J. O. Rice survey, from which a double elm brs. N. 26 W. 24 vrs., another elm brs.—

Thence S. 19 W. with the line of said J. O. Rice's survey 2,550 vrs. to a stake from which a triple elm brs. S. 19 E. 36 vrs.; thence

N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning; which said tract of land petitioner held as his own freehold, and quietly possessed the 2 same until afterwards, viz., on the 2d day of August, A. D. 1877, at which time the said defendants, with force and arms, broke and entered petitioner's close, viz., the tract of land before mentioned, and ousted and ejected your petitioner therefrom, and do still, with force and arms, hold your petitioner ousted and ejected from said land, and have, during their said unlawful occupation, broken down petitioner's grass and dug up petitioner's said —, to his damage three hundred dollars. Wherefore he sues, and prays that said defendant be cited to answer this petition, and that upon a final hearing petitioner have judgment for his costs and damages, and for a writ of restitution requiring the sheriff to place him in possession of said land; also prays for general relief, and, as in duty bound, will ever pray, &c.

GOODRICH AND CLARKSON,
For Petitioner.

The defendants will take notice that this suit is brought as well to try title as for damages.

GOODRICH AND CLARKSON,
For Pl'f.

THE STATE OF TEXAS, }
Bell County. }

L. W. Goodrich, being duly sworn, deposes and says that he is one of the attorneys for plaintiff in the petition, and that the defendants, Frank Ayres and John R. Hall, are not residents of the State of Texas.

L. W. GOODRICH.

Sworn to and subscribed before me on this the 29th day of Aug., 1877.

W. W. UPSHAW, *Clk.*
D. C. BELL, *C.*

Filed August 29th, 1877.

W. W. UPSHAW, *Clk.*
D. C. B., *C.*

Process issued to the several defendants, and on the 5th October the following demurrer and answer filed:

Demurrer and Answer of John Anderson.

Suit Pending in District Court of Bell County. Oct. Term, A. D. 1877.

A. E. WATSON
vs.
FRANK AYERS *et al.*

The defendant John Anderson demurs to plaintiff's petition, and says that the same is insufficient in law—

1st. Because it does not state facts sufficient to constitute a cause of action against this defendant.

2d. Because it does not set out the facts constituting plaintiff's cause of action with sufficient certainty.

3 Wherefore he prays judgment of the sufficiency of said petition, and that he be dismissed with his costs, &c.

FAY AND MONTEITH,
Attorneys for Anderson.

And now comes the defendant Anderson, by his attorneys, and denies all and singular the allegations in plaintiff's petition; and of this he puts himself upon the country. Wherefore he prays judgment, &c.

FAY AND MONTEITH,
Att'ys for Def't Anderson.

And for further answer in this behalf, if such shall be necessary, defendant Anderson says that he has no interest in the premises described in plaintiff's petition except as a tenant, and has never claimed any other than as the tenant, first of Sterling Smith, of McLennan county, State of Texas, and afterwards of Frank Ayers, of the county of ——, in the State of Mississippi, his codefendant herein, the first of whom was, and the last of whom is, the owner of Maximo Moreno eleven-league grant of land, in Bell county, State of Texas, and that he holds under and acknowledges Frank Ayers as his landlord, and Frank Ayers has made and acknowledged him to be his tenant, and that the said relation existed prior to the commencement of this suit and has continued to exist until the present time; that the tract of land in controversy is immediately south of the northern boundary line of the Maximo Moreno eleven-league grant, in said Bell county, in the northeastern corner of said grant, and the same, with the remainder of said Moreno eleven-league grant, is now, and was at the time when such suit was instituted, the property of said Frank Ayers, who holds through certain intermediate parties from David and Anna M. Ayers or the estate of said Anna M. Ayers, deceased, except that the estate of said Anna M. Ayers holds certain unpaid notes to secure the purchase-money for said grant.

Defendant Anderson further says that his said landlord, Frank

Ayers, has bound himself to secure him in quiet and peaceable enjoyment of the said premises in controversy, and has to him and with him contracted and stipulated that he was possessed of the entire fee in said estate, and was well able to defend the same against the plaintiff, as well as all other persons claiming or to claim the same.

Wherefore he prays that said Frank Ayers shall be required, as his landlord, to come in and defend this suit for him, and for such other and further relief as he is by law and equity entitled to, &c.

FAY AND MONTEITH,
Att'ys for Anderson.

The following answer — filed on the 19th April, 1879, to wit:

4 Suit Pending in the District Court of Bell County, Texas.
April Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Now come the defendants in the above-entitled cause, by their attorneys, and except to the plaintiff's petition and show the court that the matters and things therein alleged in the manner and form therein set out are insufficient in law to entitle said plaintiff to have and maintain his said action; and of this they pray the judgment of the court.

X. B. SAUNDERS,
W. T. RUCKER, &
A. M. MONTEITH,
Att'ys for Defendants.

And for answer, if any be required of them, the defendants deny all and singular the allegations contained in the plaintiff's petition, and say that they are not guilty of the wrongs, injuries, and trespasses therein alleged and charged against them; and of this they put themselves upon the country.

X. B. SAUNDERS,
W. T. RUCKER AND
A. M. MONTEITH,
Att'ys for Defendants.

And afterwards, on 28th April, A. D. 1879, the following amended original petition was filed, to wit:

In District Court, Bell County. Spring Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Now comes plaintiff, A. E. Watson, by his attorneys, and files this his first amended original petition, and avers that heretofore, to wit,

on the 1st day of August, A. D. 1877, he (petitioner) was seized in fee of the following-described tract of land, in Bell county, State of Texas, about 15 miles N. E. by north from the three forks of Little river: Beginning at the S. W. corner of league No. 8 for the S. E. corner, from which an elm brs. S. 43 E. 120 varas, another bears S. 26 W. 70 varas, thence N. 19 E., at 1,170 varas and at 1,720 vrs, branches, at 2,375 varas the N. E. corner of this survey, from which a hackberry marked A bears N. 75 E. 23 varas, an elm marked B bears N. 14 W. 34 vrs.; thence N. 71 W. 940 vrs. and 2,785 vrs. crossed branches, at 3,508 vrs. the N. W. corner, from which a hackberry marked C brs. N. 35 E. 195 vrs., another marked B bears N. 36 E. 143 vrs.; thence S. 19 W. 500 vrs., a creek, at 2,375 vrs., a mound, the S. W. corner; thence S. 70 E., recrossing creek, 3,508 vrs. to the place of beginning; which said tract of land pl't'ff held and possessed as his own freehold estate until afterward, to wit, the 2d day of August, A. D. 1877, at which time the said def'ts, Frank Ayers and John R. Hall and John Anderson, with force and arms, broke and entered your petitioner's close, the tract of land aforesaid, and ousted and ejected pl't'ff therefrom, and do still, with force and arms, hold plaintiff ousted and ejected from said land, and have, during their said unlawful occupation, broken down petitioner's grass and dug up petitioner's soil, to his damage five hundred dollars.

Wherefore petitioner prays that said def'ts be cited to answer, and that upon final hearing petitioner have judgment for his said land, damages and costs, and that a writ of possession issue requiring the sheriff to place petitioner in possession of said land; also prays for general relief.

GOODRICH AND CLARKSON,
Att'ys for Pl't'ff.

And afterwards, on the 29th day of April, A. D. 1879, the following 1st amended original answer was filed, to wit:

1st Amended Original Answer.

Suit Pending in the District Court of Bell County, Texas, to April Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Now come the defendants in the above entitled and numbered cause, and, leave of the court being had, file this their first amended original plea and answer in lieu of their original answer and plea filed in this cause on the 19th day of April, 1879, and, first excepting to the plaintiff's petition, they show the court that the matters and things therein alleged in the manner and form therein set out are insufficient in law to entitle said plaintiff to have and maintain his said action; and of this they pray the judgment of the court that

they go hence without day and recover all costs in this behalf expended, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Def'ts' Att'ys.

Answer.

And for answer, if any be required of them, these defendants deny all and singular the allegations contained in said plaintiff's petition, and say that they are not guilty of the wrongs, injuries, and trespasses as therein alleged and charged against them; and of this they put themselves upon the country.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Defendants' Att'ys.

Further Answer.

And for further answer, if any be required of them or either
6 of them, the defendants Frank Ayers alleges and shows the court that he is, and was at the time of the institution of this suit, the only just, legal, and equitable owner in fee simple of the following-described tract of land, situated in Bell county, Texas, viz.: Eleven leagues of land granted by the government of Coahuila and Texas to Maximo Moreno in the year 1833, said grant having field-notes as follows, viz: Situated on the left margin of the River San Andres, below the point where the creek called Lampasas enters said river on its opposite margin, and having the lines, limits, boundaries, and landmarks following, to wit:

Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner; thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner; thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the River San Andres, which tree is called in English "box elder," from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 in. dia. thence, following up the river by its meanders, to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas.

And this defendant further alleges and shows the court that the land described in the plaintiff's petition and claimed by him, said

plaintiff, under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, is embraced within the boundaries of said eleven-league grant and in conflict with said eleven-league grant, which is an elder and superior title to said pretended patent from the State of Texas to the heirs of W. W. Daws, dec'd; all of which this defendant is ready to verify.

Wherefore, the premises considered, he asks for judgment against said plaintiff that he take nothing by his said suit, and that said pretended patent can be canceled and held for naught, and for all costs, and for general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant F. H. Ayres.

And the defendant John Anderson, for further answer, alleges and shows to the court that he is occupying the said Maximo Moreno eleven-league grant as the tenant of his codefendant Frank Ayers, and more especially 100 acres of said eleven-league grant, in-
7 cluding his improvements where he resides, is held by him under said Maximo Moreno eleven-league title, said 100 acres fronting on the west side of Cottonwood creek, and to run back N. 71° W. from said creek, so as to include the improvements of this defendant. This defendant alleges and shows to the court that he had been in possession of said land for a long period before the date of the institution of this suit, holding the same adversely and in good — for a period of more than twelve months before the date of the institution of this suit, and that he has made permanent and valuable improvements upon said land during the time he has held possession of the same in good faith as aforesaid of great value, viz., of the value of one thousand dollars; all of which this defendant is ready to verify. The premises considered, he says that said plaintiff ought not to recover anything against this defendant, and he asks for judgment against said plaintiff for all costs of this suit, &c.; but if the court should hold that said plaintiff is entitled to recover against him and his landlord and codefendant the land aforesaid, then this defendant asks for a judgment against said plaintiff for the value of his improvements made in good faith as aforesaid, and for all costs and general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant John Anderson.

Agreement of attorneys for both parties filed April 14th, 1879, as follows, to wit:

A. E. WATSON
vs.
FRANK AYERS *et al.*

In this cause it is agreed for the purpose of a trial that the plaintiff may read in evidence certified copy from the land office of the patent to the heirs of W. W. Daws, dated Sept. 16th, 1850, and it is admitted that plaintiff has all the title vested in said heirs by virtue of said patent. It is also agreed that def'ts may read in evidence land office translated copy of the Maximo Moreno eleven-league grant issued in 1833, and it is admitted that defendants have all the title vested in said Maximo Moreno by virtue of said grant. The object of this agreement is to relieve parties of the necessity of deraigning title from said original grantees.

April 14th, 1879.

GOODRICH AND CLARKSON,
Att'ys for Plaintiff.
X. B. SAUNDERS,
W. T. RUCKER, AND
A. M. MONTEITH,
Att'ys for Def'ts.

Be it remembered, at the regular April, A. D. 1879, term of the district court of Bell county, Texas, the following orders were made and the following proceedings had, to wit:

8

A. E. WATSON
vs.
FRANK AYERS *et al.*

Defendant demands a jury.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Plaintiff has leave to file first amended original petition.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Defendants have leave to file first amended original answer.

And afterwards the following entry appears on the minutes of the court, to wit:

Verdict and Judgment.

A. E. WATSON
vs.
FRANK AYERS *et al.*

APRIL 29TH, A. D. 1879.

This cause coming on to be heard on the 29th day of April, A. D.

1870, came the parties, by their attorneys, and announced ready for trial: thereupon came a jury of twelve good and lawful men, to wit, J. D. McMahon and eleven others, who were duly impaneled and sworn to try said cause, and after hearing the evidence, the argument of counsel, and the charge of the court retired to consider of their verdict, and on the 30th day of April, 1879, returned into open court and announced to the court that they could not agree, whereupon a mistrial is had, and jury discharged and cause continued.

And afterwards, on the 16th April, A. D. 1880, the following admission of defendants was filed in the district court of Bell county, to wit:

Admission of Defendants.

Suit Pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.*

It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title, and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16th, A. D. 1850, said land patented being one-third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said one-third of a league of land so patented as aforesaid to the heirs of Walter W. Daws is covered by the grant of the government of Coahuila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition, which said eleven-league grant is an older and superior title to that of plaintiff's, and the title to which is in the defendants in this cause.

9

X. B. SAUNDERS,
W. T. RUCKER,
F. H. SLEEPER, AND
A. M. MONTEITH,
Att'ys for Defendants.

2d. Order and verdict, as follows:

Be it remembered that afterwards, to wit, the 19th day of April, A. D. 1880, this cause went to trial, and the jury returned into open court and announced that they could not agree; whereby a mistrial was had and the jury discharged.

Motion to Remove.

And afterwards, to wit, April —, 1880, the defendant moved the dist. court of Bell county to remove this cause to the Federal court in and for the northern district of Texas, in words as follows, to wit:

Motion to Remove Cause to Circuit Court of United States for the Northern District of Texas, at Waco.

In District Court, Bell County, Texas, at Spring Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

To Hon. Charles J. Jennings, special judge, presiding:

Your petitioner, Frank H. Ayers, who is a citizen of Jackson county, State of Mississippi, and defendant in this cause, respectfully shows that the plaintiff in this suit is a citizen of the State of Texas, and this defendant was, at the date of the institution of this suit, a citizen, as aforesaid, of said State of Mississippi; that this is a suit between citizens of different States, and the amount in controversy in this suit exceeds in value the sum of five hundred dollars, and there can be a final determination of the controversy in this suit, so far as he is concerned, without the presence of the other defendants as parties in the cause.

Wherefore he prays your honor that he be permitted to remove said cause for trial, together with copies of all papers therein, to the circuit court of the United States for the northern district of Texas, at its next term, in the terms of the law, and, as in duty bond, &c.

F. H. AYERS,
By SAUNDERS, RUCKER,
MONTEITH & SLEEPER, *Att'ys.*

10 *Order on Motion to Remove Cause Granted.*

Motion to remove cause to circuit court of U. S. for northern district of Texas.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

On this the 23d day of April, A. D. 1880, this motion coming on to be heard, and the matters and things therein contained be fully understood by court, it is ordered and decreed by the court that the said motion be, and it is hereby, granted.

Bond for Removal of Cause from Bell County to U. S. Circuit Court, Northern District of Texas.

Suit Pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

Know all men by these presents that we, F. H. Ayers, as princi-

pal, and —— —— and —— ——, as sureties, are held and firmly bound unto A. E. Watson, plaintiff in the above-entitled cause, in the sum of one hundred and fifty dollars; for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, forever, jointly and severally, firmly by these presents; conditioned that the said F. H. Ayers shall well and truly enter in the circuit court of the United States for the northern district of Texas, at its next session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause.

Witness our hands and scrolls for seals this 20th day of April, A. D. 1880.

F. H. AYERS. [SEAL.]
W. S. RATHER. [SEAL.]
G. M. McWHIRTER. [SEAL.]

Approved the 20th day of April, A. D. 1880, and filed the 20th day of April, A. D. 1880.

W. P. BLACKBURN,
D. C. Bell Co.

The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting.

Be it remembered that at a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the October term, A. D. 1880, Hon. Andrew P. McCormick, district judge, presiding, among other the following proceedings were had:

11 MONDAY MORNING, *Octo. 11th*, 1880.

Court met pursuant to adjournment.

Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court, U. S. att'y, marshal, and clerk.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34.

On the 8th day of October, A. D. 1880, came the plaintiff and the defendant, by their respective attorneys, and thereupon came a jury of twelve good and lawful men, who were duly impaneled, tried, and sworn to try this cause, to wit, 1, C. C. McCulloch; 2, Tony Hoeffner; 3, E. Harlan; 4, J. H. Morrison; 5, J. K. Proctor; 6, A. J. Moore; 7, Jas. F. Edrington; 8, A. E. Osborne; 9, T. J. McQueen; 10, M. D. Wynne; 11, V. B. Ritter; 12, W. Sedberry; and the jury, having heard the evidence, the argument of counsel, and the charge of court, retired to consider of their verdict, and on this the 11th day of October, A. D. 1880, the jury came in open court and reported that they could not agree upon a verdict; whereupon they were discharged from further consideration of the case and a mistrial adjudged, and it was thereupon ordered that the case be continued on that account.

And afterwards, to wit, on April 11th, 1881, the following entry appears upon the minutes of the court:

MONDAY, *April 11th*, 1881.

Court met pursuant to adjournment.

Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court, U. S. att'y, marshal, and clerk.

A. E. WATSON *vs.* FRANK AYERS *et al.* } No. 34. April 9th, 1881.

On this 9th day of April, A. D. 1881, this cause being called for trial, the parties—plaintiff, A. E. Watson, and defendant F. H. Ayers—announced ready for trial, and the defendant John R. Hall, failed to appear.

Thereupon came a jury of twelve good and lawful men, to wit, C. C. Winscott, Milam Shelton, Sam. O'Neal, A. J. Lott, Henry Kertin, W. W. Berry, J. R. Raines, Sam. Cox, Hamp. Capps, Hamp. Fancher, J. A. McKee, and C. N. Alexander, who, after hearing the evidence, argument of counsel, and charge of court, retired to consider of their verdict, and after due consideration returned the following verdict, to wit:

"We, the jury, find for the plaintiff.

"JAMES A. McKEE, *Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the plaintiff, A. E. Watson, do have and recover of and from
12 the said defendants, Frank Ayers and John R. Hall, the following-described tract of land, lying on Cottonwood creek, in Bell county, in the northern district of Texas, to wit:

Beginning at a stake, from which a hackberry marked B. T. D. brs. north 36 E. 143 varas, thence S. 71 E., at 107 vrs. passes corner of the Kavanaugh survey, 3,767 varas, a stake in west line of J. O. Rice survey, from which double elm bears N. 26 W. 24 varas, another elm brs. —; thence S. 19 W. with the line of J. O. Rice survey 2,550 varas to a stake, from which a triplicate elm bears S. 19 E. 36 vrs.; thence N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning.

And it is further ordered that a writ of restitution do issue to the marshal of said district, commanding him to eject said defendants and all persons claiming by, through, or under by right acquired since the 29th day of August, A. D. 1877, being the date of the institution of this suit, and to put the plaintiff in possession of the aforesaid land recovered by him.

It is further considered, ordered, and adjudged by the court that the plaintiff do have and recover of and from said defendants all costs by him in this behalf expended, for which let execution issue.

And afterwards the following motion was filed, endorsed, to wit: "No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Motion for new trial. Filed April 11th, 1881. J. H. Finks, clerk." Which is as follows:

Motion for New Trial.

In the Hon. U. S. Circuit Court, Northern District of Texas, at Waco.

A. E. WATSON
vs.
FRANK AYERS. } No. 34.

And now comes the defendant Ayers and moves the court for a new trial, because—

1st. The court erred in the charge to the jury in this:

1st. There are three corners of the survey of Maximo Morino grant established on the ground, to wit, the beginning corner or upper river corner, the lower river corner, and the N. W. corner of the grant. There was evidence tending to show that the line from the lower river corner was marked by the original surveyor to the N. E. corner, as claimed by the defendant. There was also evidence tending to show that a line running 155 varas north of a line running the N. W. corner, as ascertained by measurement of the distance called for in the grant, and running the course called for in the grant for the N. E. corner, was marked by the original surveyor and can now be found, and when protracted 560 varas will intersect with the line marked for the south line within two varas of a tree marked by the original survey on the south or east line. On
13 this evidence the jury should have been charged that if they believe from the evidence that the lines so marked were made by the original surveyor, the point of intersection of these lines must be taken as the N. E. corner of the grant, whether the trees called for are found there or not.

2. That part of the charge relating to the measurement of 11 leagues of land by estimating the quantity embraced by giving a front allowed for an eleven-league grant, running the lines from the corners on the river and extending back on the courses, called for a sufficient distance to embrace eleven leagues of land, is not applicable to this case and was calculated to mislead the jury.

2. The court erred in not giving the charges asked by defendant.

SLEEPER, JONES & KENDALL,
Att'ys for Defendant.

Order Overruling Motion for a New Trial.

Motion submitted and judgment entered as follows:

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34.

MONDAY, *April 18th*, 1881.

On this day came the parties, by attorneys, and thereupon came on to be heard the defendants' motion for a new trial. The court being fully advised and the law appearing to be for the plaintiff, it is hereby ordered that the motion be, and is, overruled.

And afterwards, to wit, on the 2d day of May, A. D. 1881, writ of possession issued, endorsed as follows: No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Writ of possession issued May 2d, 1881. J. H. Finks, clerk. Writ of possession returned and filed May 13th, 1881. J. H. Finks, clerk. Which said writ is in words as follows, to wit:

Writ of Possession.

United States Circuit Court, Fifth Circuit and Northern District of Texas, at Waco.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

Whereas, on the 9th day of April, A. D. 1881, A. E. Watson recovered a judgment in the United States circuit court in and for the northern district of Texas, at Waco, against Frank Ayers and John R. Hall for the possession of a certain tract of land lying on Cottonwood creek, in Bell county, in the northern district of Texas, bounded and described as follows, to wit:

Beginning at a stake, from which a hackberry marked B. T. D. bears N. 36° E. 143 vrs., thence S. 71 E., at 107 vrs. passes corner of the Kavanaugh survey, 3,767 vrs., a stake in west line of J. O. Rice survey, from which double elm bears N. 26 W. 24 vrs., another elm bears —; thence S. 19 W., with the line of J. O. Rice survey, 2,550 varas to a stake, from which a triple elm brs. S. 19 E. 36 varas; thence N. 71 W. 3,767 varas to a stake on a hill on prairie; thence N. 19 E. 2,550 vrs. to the place of beginning, and all costs of suit as of record is manifest: Therefore, you are hereby commanded to eject said defendants and all persons claiming by, through, or under them by right acquired since the 29th day of August, A. D. 1877, being the date of the institution of this suit; and you are further commanded that you deliver to the said A. E. Watson the possession of said premises hereinbefore described, together with the sum of — dollars, costs of suit. These are, therefore, to command you that of the goods and chattels, lands and tenements and estates, of the said Frank Ayers and John R.

Hall you cause to be made the costs aforesaid, together with the legal fees and commissions for collecting the same, and also the costs of executing this writ, and have you said money, together with this writ, before our circuit court, on or before the first day of next term thereof, to be begun and held at Waco on the first Monday, being the 3d day, of October next. Herein fail not, but due return make, as the law directs, of this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Waco, this the 2d day of May, in the year of our Lord eighteen hundred and eighty-one, and of American Independence the 105th year.

[SEAL.]

J. H. FINKS,
Clerk of said Court.

The U. S. marshal's return upon the writ of possession is in words and figures as follows:

Marshal's Return.

Came to hand on May 3d, 1881, and executed on May 7th, 1881, by delivering unto A. E. Watson, pl'ff herein, the possession of the premises described in this writ by going with s'd A. E. Watson to John Anderson, the only occupant of the land, and demanding from him the possession thereof, which was amicably surrendered by him to s'd A. E. Watson.

A. B. NORTON,
U. S. Marshal, N. D. of T.,
By J. C. CHAPMAN, *Deputy.*

Fee	$3 00
Travel	5 40
	$8 40

15 In the Circuit Court of the United States for the 5th Circuit and Northern District of Texas.

A. E. WATSON, Plaintiff,
vs.
FRANK AYERS *et al.*, Def'ts. } No. 34.

Now comes the plaintiff (A. E. Watson), by his attorneys, and moves the court to remand this cause to the district court of Bell county for the following reasons, viz:

1. Because the petition for removal filed in this cause in the State court does not, on its face or in connection with other parts of the record, exhibit a suit of which this court has jurisdiction.

2. The removal to this court from said State court being sought on the ground of diverse citizenship, it is not sufficient to allege in the present tense "that the plaintiff in this suit is a citizen of the State of Texas," without also alleging that he was such citizen at the time the suit was instituted.

3. The ground of removal being diverse citizenship, it is not sufficient to allege that "this defendant was at the date of the institution of this suit a citizen, as aforesaid, of said State of Mississippi," without also alleging that he was such citizen at the time the said petition for removal was filed.

4. Said petition for removal does not show by direct allegation of facts that at the time of the institution of this suit in the State court and at the time of filing said petition for removal that said A. E. Watson and Frank Ayers were citizens of different States.

5. Said petition for removal was not filed in time and did not have the effect to divest the State court of its jurisdiction.

Wherefore, because this court has no jurisdiction, as shown by the record, to hear and determine this cause, and because the said State court has not been divested of the jurisdiction which it
16 lawfully acquired, the plaintiff prays that this cause be remanded to the State court at the costs of said defendant, Frank Ayers.

GOODRICH & CLARKSON,
Att'ys for Pl'ff.

Endorsed: No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Motion to remand. Filed Ap'l 14, 1890. J. H. Finks, clerk, by C. A. Richardson, dep'y.

Order on Motion to Remand.

A. E. Watson
vs.
Frank Ayers *et al.* } 34.

April 21st, 1890.

On this day came on to be heard the motion of plaintiff to remand this cause to the district court of Bell county, Texas, and the court, having heard the argument of counsel and having duly considered the same, is of opinion that the said motion is not well taken. It is therefore ordered that said motion be, and is hereby, overruled; to which ruling of the court plaintiff, by counsel, in open court excepts.

Charge of the Court.

A. E. Watson
vs.
F. H. Ayers *et al.* } 34. Charge of the Court to the Jury, Given on this the 2nd Day of May, 1890.

By the admission of the defendant the plaintiff is entitled to recover, unless the Maximo Marino eleven-league grant extends over all or a part of the Daws one-third of a league.

The defendant assumes the burden of showing that said eleven-league grant does embrace a part of the land patented to Daws and owned by plaintiff.

There is no question as to the validity of the title, except so far as it may be affected by a conflict of boundaries.

17 There is no dispute between the parties as to the extent of the front upon Little river (St. Andrews), both the corners on the river being clearly ascertained and accepted by the parties; nor is there any question that the eastern line of said grant was clearly marked and is now certainly well known to have been run and actually marked for the distance of 26 or 27,000 varas, crossing Cow creek (now called Big Elm) at a given distance from the Little river, mentioned in the original field-notes and found to correspond with the actual distance between those streams on said line.

The original field-notes do not call for any landmarks at the intersection of the western line with the back or north line of the survey. At the intersection of the back line with the eastern line two small hackberries are mentioned as serving for a landmark to designate the corner.

Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them, on the ground with reasonable certainty, and where he cannot be tracked on the ground we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field-notes of the survey, and that marked trees designating a corner or a line on the ground shall control both course and distance.

In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the "beginning" corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field-notes

18 there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.

There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant, and if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses Sam. and Pat. Bigham were the two hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood N. 70 W. until it intersects the western line of said grant will bound the eleven-league grant upon the north, and if the Daws one-third of a league is situated wholly north of this line it does not conflict with said eleven-league grant, and you will find for the plaintiff.

If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner

at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began the survey at the "cotton-wood" corner (the S. E. corner) and marked and measured the east line and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line)—from this point
19 where you find his footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line, and if this line so run will fall wholly south of the Daws survey you will find for the plaintiff.

If from the proof you are not able to fix the place where the two hackberries called for in the grant as a landmark to designate the N. E. corner of the Moreno grant then stood and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the foot prints left by the surveyor you will fix the boundaries of the Moreno grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line extended on its course to the point of intersection with the extended second or north line, and if the north line so fixed will embrace in the Moreno grant any part of the Daws survey you will find for the defendant.

A. P. McCORMICK, *Judge.*

Endorsed: No. 34. A. E. Watson *vs.* F. H. Ayers *et al.* Charge of the court. Filed May 2, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

Judgment.

A. E. Watson
vs.
Frank Ayers *et al* } 34. May 2nd, 1890.

On the 30th day of April, A. D. 1890, this cause being called for trial, the parties—plaintiff, A. E. Watson, and defendant F. H. Ayers—appeared and announced ready for trial; thereupon came a jury of good and lawful men, to wit, W. T. Worthington, A. J. Berry, A. C. Odle, J. R. Rucker, F. M. Ryburn, L. R. Person, W. W. Johnson, F. M. Scott, A. J. Woods, J. R. Sanford, Ed. Hardin, and Charles Fortran, who were duly selected, empaneled, and sworn, and who,
20 after hearing the evidence, the argument of counsel, and charge of the court, retired on the 2nd day of May, 1890, to consider of their verdict, and after due consideration returned into open court the following verdict, to wit:

"We, the jury, find the land in controversy for the plaintiff.

"A. J. WOODS, *Foreman.*"

It is therefore ordered and adjudged by the court that the plaintiff, A. E. Watson, do have and recover of and from the said defendants, F. H. Ayers and John R. Hall, the following-described tract of land lying on Cottonwood creek, in Bell county, in the northern district of Texas, to wit: Beginning at a stake, from which a hackberry marked B T D brs. N. 36 E. 143 varas, thence S. 71 E., at 107 vrs. passes corner of the Kavanaugh survey, 3,767 vrs., a stake in west line of J. O. Rice survey, from which a double elm brs. N. 26 W. 24 vrs., another elm brs. —; thence S. 19 W. with the line of J. O. Rice survey 2,550 vrs. to a stake, from which a triple elm b'rs S. 19 E. 36 vrs.; thence N. 70 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning. And it is further ordered that a writ of restitution do issue to the marshal of said district, commanding him to eject said defendants and all persons claiming by, through, or under them by right acquired since 29th day of August, A. D. 1877, being the date of the institution of this suit, and to put the plaintiff in possession of the aforesaid land recovered by him. It is further considered, ordered, and adjudged by the court that the plaintiff do have and recover of and from said defendants all costs by him in this behalf incurred, for which let execution issue.

Motion for New Trial.

In Hon. U. S. Circuit Court, Northern District of Texas, at Waco.

A. E. WATSON
vs.
F. H. AYERS.

21 Now comes defendant, F. H. Ayers, and moves the court to set aside the verdict of the jury rendered in this cause on the 2nd day of May, 1890, and grant a new trial in this cause for the following reasons, to wit:

First. Because the verdict of the jury is contrary to the law.

Second. Because the verdict of the jury is contrary to the law.

Third. Because the court erred in admitting in evidence over the objection of defendant the sketch or map of surveys of land on San Andres river referred to in the testimony of the witnesses Walsh, Pressler, and De Bray, for the reasons—

First. That there was no sufficient proof of the fact that said sketch or map was made or drawn by F. W. Johnson, who located the Maximo Moreno grant.

Second. Because said map or sketch does not show the relative position of the surveys adjoining the Moreno grant.

Third. Because said map or sketch is not shown to have been made at or previous to the time when said Moreno grant was located, and there is no testimony showing its existence previous to 10 or 15 years subsequent to the time when said Maximo Moreno grant was actually located.

Fourth. Because if said map indicates that said lines of the Maximo Moreno grant were run in a different way from the manner

in which the witness Johnson testifies he actually ran them on the ground the same is not admissible as a contradictory statement of said witness, because he had not been previously interrogated thereto in cross-interrogatories previously propounded by plaintiff in this cause.

Fourth. The court erred in admitting in evidence the certified copy of the field-notes of the Sawyer survey over the objec-
22 tion of defendant, for the reason that the same did not tend in any way to show the true location of the Maximo Moreno survey, and because there is no evidence to show or tending to show that the field-notes of the Sawyer survey were adopted by F. W. Johnson, the surveyor who located the Moreno grant, for the field-notes of the Moreno grant, and because there is no evidence tending to show that the field-book of Johnson, from which said copy of the field-notes of the Sawyer survey was taken, was in the land office previous to 10 or 15 years subsequent to the time when said Moreno survey was located.

Fifth. Because the court erred in admitting the photographed copy of the said Sawyer field-notes for the same reasons above mentioned.

Sixth. Because the court erred in refusing to give to the jury the instructions numbered 1, 2, 3, 4, 5, and 6 requested by defendant.

Seventh. Because the court erred in that portion of its charge to the jury contained on page 2 of the court's charge and on lines 7 to 15, inclusive, on said page, for the reason that the charge then given is not applicable to the state of facts proven on the trial of this cause.

Eighth. Because the court erred in that portion of the charge to the jury contained on page 3 of said charge and on lines 1 to 16, inclusive, of said page, for the reason that there was no proof showing or tending to show that F. W. Johnson, the surveyor who located the Moreno grant, begun said survey at the Cottonwood or S. E. corner of said grant, and because the court erred in directing the minds of the jury to that corner rather than any other.

Ninth. Because the court erred in assuming in its charge to the jury as an undisputed fact that the crossing by the east line of the Moreno grant on Cow creek (now called Big Elm) at a given distance from Little river, mentioned in the field-notes, was found to correspond with the actual distance between those streams on
23 said line.

D. W. DOOM,
JONES, KENDALL & SLEEPER,
Att'ys for Defendant, F. H. Ayers.

Endorsed: No. 34. A. E. Watson *vs.* F. H. Ayers. Motion for new trial. Filed May 3rd, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

Order Overruling Motion for New Trial.

A. E. WATSON
vs.
F. H. AYERS *et al.* } 34.

MAY 8TH, 1890.

On this day came on to be heard the motion of defendants for a new trial, and the court, having heard and duly considered the same, is of opinion that said motion is not well taken. It is therefore ordered by the court that defendants' said motion for a new trial be, and is hereby, overruled.

Bill of Exceptions.

In Hon. U. S. Circuit Court for Northern District of Texas, at Waco.

A. E. WATSON
vs.
F. H. AYERS *et al.* } No. 34.

Bill of exceptions of defendant.

Be it remembered that on the trial of this case the following evidence was offered to the jury:

Plaintiff read in evidence the patent from the State of Texas, dated 16 Sept., 1850, to the land claimed by him having the metes and boundaries as set forth in his petition.

The defendant read in evidence the original grant to Maximo Moreno, dated 18 Oct., 1833, containing the metes and boundaries as set forth in defendant's first amended original answer filed
24 April 29th, 1879.

It was admitted that the plaintiff and defendants respectively held and owned title from and under the patent and grant above referred to according to agreement in writing in this cause filed.

It was admitted by both parties that the upper and lower corners on the river of the Maximo Moreno 11-league grant are extant, as called for in the original grant to Maximo Moreno, and these corners are not in dispute.

The defendant read in evidence the depositions of F. W. Johnson taken in 1878 and 1880, in which he testified he was principal surveyor for Austin's colony in 1833, and that year began at a place where what is known as the reserve crosses San Andres or Little river, and for the purpose of getting a base line upon which to make surveys he meandered upward to the junction of the Salado, Lampasas, and Leon rivers called the three forks, in what is now Bell county, Texas. He meandered the river upwards on both sides to that point. On the east side of the San Andres river opposite where the Lampasas river enters the San Andres river he began to make a

series of surveys on the north side of the San Andres river. The first survey made was the Maximo Moreno eleven-league survey. This survey was commenced at the point opposite the mouth of the Lampasas river, as called for in the field-notes of the grant, and a line was run thence on the course called for in the grant—the distance called for—the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. In running the west line I made an offset to avoid crossing the Leon river, which was about 50 or 60 varas wide. This offset was made soon after leaving the beginning corner, there being a
25 peculiar bend in the river at that point. From the northwest corner thus established the second line was run the course and distance called for in the grant. Several streams were crossed on this line at distances not now recollected and the northeast corner established on two hackberries in Cow Creek bottom. From the northeast or third corner so established a line was run in the course called for in the grant to San Andres river. This last line was marked but not measured, because it was not usual or necessary to measure the closing line. It was admitted by defendant that the distance as marked on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for—that is, the distance is 7,500 instead of 3,500 vrs., and on cross-examination, being asked for the discrepancy, said the distances called on that line were not measured, but guessed at, no part of the east line being measured. The exterior lines were marked with blazes. The corner trees and bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to question on cross-examination he said that he did not begin the survey at the southeast corner, but he began at the southwest corner, at the three forks at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field-notes and as hereinbefore stated.

My field-notes of the survey were made in English and so reported to the empressario and by him transcribed and translated into Spanish, and thus carried into the title. The discrepancies between the field-notes and the actual distance may have occurred in translating, and it may be attributed to the fact that the distance of the east line was not measured, but guessed at, it being unusual and unnecessary to measure the third line. I never made but
26 one survey of the Moreno grant. When I surveyed the Moreno grant Wm. Duty assisted me as a chain-carrier.

WILLIAM DUTY testified, by deposition taken in 1880, by defendant, that he was with F. W. Johnson in 1833 when the Maximo Moreno grant was surveyed, and was one of the chain-carriers; that the survey was begun at a point opposite the mouth of the Lampasas, on the north side of the San Andres. We struck a bend in the river soon after leaving the beginning corner, and an offset was taken to avoid the bend until we got clear of the stream, and then ran back to the original line so left, and this line was continued on

the course called for to the second or northwest corner. From this corner a line was run to the third or northeast corner. Both the first and second lines were measured on the ground. The third line was run on the course called for to the fourth or lower river corner, but I don't think this last line was measured. The line trees were marked with blazes. Col. Johnson invariably marked lines with blazes. I know positively that we began the Moreno survey at the mouth of the Lampasas river and ran the lines as stated in the field-notes. I have a very distinct recollection of this survey.

And the same witness, testifying by deposition taken in 1885, said that he went in 1885 upon the ground with Mr. Turner, the county surveyor of Bell county, and Mr. Moore, for the purpose of making an examination of the boundaries of the Moreno survey. There was an old blazed line pointed out to me as the north line of Moreno survey, at or near where the defendant claims it to be. I traced the said line, following the surveyor, and the line was marked with three hacks. A place was pointed out to me in the bottom by Mr. Turner and Mr. Moore, on the east line of said survey,
27 where it is said the double hackberry or two hackberries stood, known as the Bigham corner, and claimed by plaintiff as northeast corner of survey. I noticed the character of country surrounding the Bigham corner, and it does not correspond with the country of the northeast corner of said survey; would say that the corner and surroundings pointed out to me by Mr. Turner as the Bigham corner or the double hackberry does not correspond with the country around the original northeast corner of Moreno survey, which, to the best of my recollection, was glady, with brush predominating.

The witness further testified by deposition taken by plaintiff in 1886 that he again went upon the grounds and examined the north lines, as claimed by plaintiff and defendants respectively, and neither correspond- in appearance of the country with the line originally run by us in making the survey. About two hundred varas below the north line, as claimed by plaintiff, near Elm creek, the appearance of the country looked familiar and like that through which we originally ran the survey. This witness testified in his deposition taken for the defendant in 1880 that he remembered that the N. E. corner of the grant was located in Cow Creek bottom. In his deposition taken by plaintiff he testified that the survey was made originally in the spring of 1833; that he did not remember for whom the survey was made, but knows that but one survey was ever made of this territory, and that was in the spring of 1833 by F. W. Johnson, principal surveyor of Austin & Williams' colony, and I was present as a chain-carrier. After the survey in 1833 I had not been on the ground till I went there with the defendant in 1881 to examine the ground. I was again on the ground in 1885. I went out at the instance of the plaintiff, and was accompanied by Mr. Hunnicutt, Co. surveyor of Falls county; Capt. Harris *et al.* About 200 vrs. south of the place where the two small hackberries

grew, on the east line of the survey, there is a marked line
28 running the course of the north line. The surveyor who was with me traced this line some distance, and we found four or five old marked trees with old blazes, apparently very old. When I was on this survey in 1881 with def't, and while on the line known as the McMillan line, which is the north line of the survey, as run from the double hackberries, in passing over the high country overlooking Elm creek, I told those with me that this looked like the place where we had made the north line of the survey, and when we reached the place where these hackberries — I told them that it looked like the place where we had made the N. E. corner of the survey. In running the north line, as claimed by the plaintiff, you, on the west side of Elm creek, pass over a very high country which overlooks the timber of the creek and the surrounding country. I remember also that on this north line we camped in the bottom of Elm creek, very near the N. E. corner, in a little glade or opening, and as we were about to leave camp the Indians came on us, and we were much disturbed till we found them friendly. These things made a lasting impression on my mind. I remember that the northeast corner was made in the timber in the bottom of Elm creek, and the place where the plaintiff claims the N. E. corner to be, where the 2 hackberries grew, corresponds with my recollection of the place where we made the corner.

I know the places where the defendant claims the N. E corner and north line of the survey. They do not correspond with my recollection. The N. E. corner as claimed by the defendant is in the prairie. The corner we made was not in the prairie, but in the bottom timber. The north line passes over a low prairie country, slightly undulating. I do not think the corner is 100 vrs. from the place claimed by the plaintiff. My recollection is that when
29 the original survey was made the north and east line was actually measured. I know that none of us knew the distances to and between creeks, and we could not have got such distances except by measurements. In running the west line I know we did not cross the Lampasas river. The river was 60 varas wide.

W. T. RUCKER, by deposition, testified that he surveyed the Moreno 11-league grant in 1871 under the orders of the district court of Bell county. He began at the beginning corner, as called for in the grant, and ran the courses and distances as called for in the grant, but they did not lead to the lower river corner, as acknowledged by both parties. The east line, giving the courses and distances, would not be reached by about 570 varas, even if the line from the lower river corner was extended to the point of intersection with the north line as he traced it. If the lines are run according to the patent calls for courses and distances, beginning at the point opposite the mouth of the Lampasas, then the east line would be about 4,000 varas longer than the distance called for in the grant. Upon actual measurement he found the distance called for in the field-notes as the distance from Elm or Cow creek to the river to be correct. He found the called-for distance or length of

the east line was less than the distance between the place where the two hackberries once stood and the river by 560 varas—that is, if a line was run on the course reversed from the lower river corner to the place where the hackberries stood it would exceed the length of the line as called for in the grant by 560 varas.

The river above the three forks is known as the Leon; below the forks as Little river or St. Andres river. Where the course would cross the Leon from the beginning corner opposite the mouth of the Lampasas river it is about 60 varas wide. Witness stated
30 that he did not find any of the calls in the grant for streams along the back line to correspond with the distances he found. He ran a line from the two hackberries, reversing the course to the intersection of the west line as run from the beginning corner, crossing four streams—Big Elm or Cow creek, Cottonwood, Little Elm, and Williamson's branch—but not at the distances, the difference being 500 varas as to one and 70 varas as to the other, and the field-notes of grant calling only for two, and found no mark on the line. On all lines run by him he found hackberry of various ages and sizes. The distance called for as the back or north lines, to wit, 12,580 vrs., from the N. W. corner, as found by following the calls of the grant, would not reach the east line as found run from lower river corner by about 560 varas. If the west line is run north 22 east 22,960 vrs., the distance called for in the grant, and the north line is run from that point S. 70 E. 12,580 vrs., the north line so located and connected with the eastern line will include the most part of land claimed by plaintiff, the W. W. Daws survey one-third of a league; but if the north line is run from the so-called Bigham corner, where the two small hackberries are said to have stood, N. 70 W., to connect with the western line, the Moreno survey would not include any part of the W. W. Daws survey.

SAM. BIGHAM, witness for plaintiff, testified as follows:

Am a practical surveyor. In 1853 or '4, under an order of the district court of Bell county, surveyed the Maximo Moreno grant. He began at the three forks, or mouth of Lampasas river, at the S. W. corner, where he found and identified the pecan and bearing trees mentioned in the field-notes; from thence he ran the course and distance called for in the grant for the N. W. corner, and there set up a pile of rocks in the prairie. In
31 running this line he found one old blaze on a tree at about 90 varas from the beginning, on the bank of the Leon river, crossing that stream twice; at second crossing, at a distance of about 4,000 varas, and half a mile beyond, he entered the prairie, the line after that passing mainly through prairie and crossing Friaro branch. From the N. W. or rock pile ran course called for S. 70 E. 12,580 varas; then ran from that point the course called for in the grant to the St. Andres river, and failed to find any other marked trees on the line or the corner called for in the grant. Afterwards, in fall of that year, he made another search for the eastern boundary line by running across the front of the survey the distance for 11-league front. He found an old line marked with blazes which

led him to the lower or southeastern corner of the grant, where he found the trees and identified them as called in the field-notes of the grant. From this point following the line N. 20 E. he found it plainly marked with old blazes 26,400 varas, crossing Big Elm or Cow creek and Little Elm creek, and, following the line further on, found it marked where there was timbers. At about 560 varas on same course found two small hackberries in Big Elm bottom, at which point the line gave out. This line, if extended, would pass between them. These trees were each marked on the inside with old blazes, the blazes facing each other, and on the blazes there were hacks, which I took to be the N. E. corner of the survey. I went a short distance above on the course of this line; did not measure but a few hundred varas, but found no marks. I ran a line from these two hackberries N. 70 W. the distance called for the north line, and fell short of reaching the western line as previously run by me by about 600 varas. On this north line so run I found no marks or marked line. The W. W. Daws survey is north of this line.
32 If the north line of the Moreno survey was run from the point where the northwest corner would be fixed by running the course and distance from the beginning or upper river corner it would include the greater portion of the Daws survey in the Moreno grant, and the latter grant so run would include about 14 leagues of land. I pointed out to F. H. Ayers the two hackberries as the northeast corner of the grant—that is, to the best of my recollection—and he assented to it. This was in 1855.

R. P. BIGHAM testified for plaintiff that he, John Marshall, and others were with his brother, Sam. Bigham, when he first attempted to find the lines and boundaries of the Moreno grant. They ran from the beginning corner, opposite the Lampasas river, the course and distances called for for the N. W. corner of the grant, where was placed a rock pile, and thence the north line by course and distance as called for in the grant, and thence from that point to the river on the course called for, with result as stated by Sam. Bigham in his testimony hereinbefore given. Witness was not with his brother, Sam. Bigham, when he made his second survey in the fall following, when it was said he had found the two small hackberries. These were afterwards, in the year 1854, shown to witness by his brother, Sam. Bigham, and they directly on the east line of the Moreno grant extended and run on the proper course from the S. E. corner of the grant. These trees were marked on the inside opposite to each other with blazes, with hacks which were fresher or more recent than the blazes. The hacks were on the blazes. Witness is a practical surveyor, and has been surveying for 30 years. After they were pointed out to me I ran a line from the lower river corner up to these trees. The line was run partly at one time and partly at another. These trees were about 560 varas beyond the distance of the east line run by re-
33 verse course. At that time witness went a short distance above the hackberry trees and found no marked trees. I was not at this point again until 1880. The hackberry

trees were then gone. At this time, 1880, in company with the defendant and Dave Webb Moore we traced the line beginning at a triple elm 560 varas below where the two small hackberries had stood, the purpose being to ascertain if the eastern line extended northward above the two hackberries mentioned. Taking the course of the line from the starting point, we ran and traced the line on its course north 20 east for perhaps one mile and a half until we got out of the timber. It was getting dark and we left off before reaching the north line as claimed by the defendant. After leaving the place where the hackberries once stood, on the course of this line, we found five or six trees with old blazes on them, which at that time appeared to me as old as the blazes on the trees below where the hackberries once stood. I thought so then and perhaps gave Mr. Ayers a certificate to that effect. I thought so then and have so testified on previous trials of this case. It is difficult to tell the age of an old line with certainty by marks on trees, but I am now of the opinion from an examination made recently at the instance of plaintiff, in company with him and his counsel and Mr. Hunnicutt, a surveyor from Falls county, and W. Harris, that they were not more than eighteen or twenty years old. The examination of these marks on the east line, of which I have spoken, was being made by the gentlemen named when I joined them. It was made by cutting out the marks on the trees and by counting the growths or ring marks in the timber. At the point claimed by the defendants as the N. W. corner of the grant there were in 1854 trees near enough to have been marked as bearing trees for corner and there were no marks on them. When Sam. Bigham showed me the two hackberries I took it to be the N. E. corner of the grant.

34 W. C. WALSH, witness for plaintiff, testified by deposition dated 27th of April, 1886. I am commissioner of the general land office of the State of Texas; have been in said office as clerk or otherwise since 1857. The sketch attached to this deposition is taken from an atlas which, in this office, is regarded as the work of F. W. Johnson; said sketch attached shows the lines, corners, courses, and distances as shown by the said map in this office.

(Here follows map marked p. 34.)

35 C. W. PRESSLER, a witness for plaintiff, testified: I am chief draughtsman of the general land office of the State of Texas. I have often seen field-notes signed by F. W. Johnson, and there is also a map on file in the general land office claimed by Johnson to have been filed by him. A certified sketch attached to these answers is a copy from a sketch on file in the general land office in Atlas E. page 1. I do not know how long said sketch has been on file in said office, but know it has been here since Dec., 1850; the handwriting of the words and figures on the sketch resemble greatly that of Johnson when compared with the map and field-notes claimed to have been made and written by him. The map from which said sketch is a certified copy is indexed on the cover of the

atlas as representing large surveys of Robertson's upper colony. The map is recognized in this office as representing the original surveys made in Austin and Williams' upper colony. I do not recollect having heard Johnson claim said map as his work. The sketch represents everything which appears on that part of the map.

The witness also testified as follows: The attached sketch represents everything which appears on that part of the map which was copied. On the original map the north or northeastern line of the Maximo Moreno grant is only partly delineated; that part of the map which should show the balance of the line is mutilated. It is mostly mutilated along the margin and through the middle where it is folded. The paper, being very brittle, is falling off in pieces and getting lost.

X. B. DE BRAY, witness for plaintiff, testified: I am Spanish clerk in the general land office of the State of Texas. I have heard Johnson claim that the field book on file in the office was written by him, but I do not know whether he did or did not acknowledge the sketch referred to by witnesses Walsh and Pressler as his work.

36 JOHN W. TURNER, witness for plaintiff, testified: I am and for several years have been county surveyor of Bell county. In 1880 I was employed by the defendant to trace the eastern and northern lines of the Moreno grant. There was with me the defendant, David and Lovett Moore, and Webb Moore when we began our work to trace a line from the point where Sam. Bigham found two small hackberries, which he, Bigham, took to be the northeast corner of the Moreno survey. From this point, running the course of the east line as called for in the grant reversed, I traced a line for about 4,000 varas. Along this line we found several trees marked with blazes, the last one about the distance named from the point where we began. We found, perhaps, as many as six trees, and I thought then, and have so testified on former trials of this case, that they appeared to be as old as those which I found in tracing the line from the S. E. corner on the river to the Bigham corner, where the two hackberries were found.

Witness then undertook to find the north or back line; went to the rock pile made by Bigham in 1854 as the northwest corner and began his survey from there and ran S. 70 E. The country was prairie from the rock pile for about 7,000 varas, and at that distance a hackberry tree was found about 100 varas north of the line being run. On examination the tree was found to have an old blaze on it. The witness moved his compass to this tree, and continuing from thence the same course S. 70 E. to a point where the line he was then running intersected the line he had traced from the two small hackberries. At this point the country was glady prairie. He found three trees on this line marked with old blazes, and a few varas from this point of intersection found a tree marked with an old blaze on the east line within a few feet of this point of in-
37 tersection. Witness also found at this point a part of the body of a hackberry tree which had rotted. It appeared to me at that time that these blazes on the north and east lines were of the

same age. Near the point of intersection was a small branch lying north and east of the point of intersection and near it. I was on the eastern line and on the most northern line run by me from the rock pile recently. I was with the plaintiff and the parties when they were cutting the trees along the line for the purpose of examining the marks. In running the line from the hackberry corner northward, on a course which brought us to a point 70 varas west of the point of intersection spoken of above, I found but one marked tree with a blaze on it, which stood about 20 varas east of the line we ran. I saw none of the trees which I had seen in 1880. The block cut from this tree we examined, and we also cut the marks on the blaze trees found on the north line, and from the examination made of the growth of the grain of the tree I do not think they were more than 18 or 20 years old. My opinion is that the marks on the tree so examined by us had not been made more than 18 or 20 years.

On cross-examination witness was shown the map introduced in evidence by plaintiff and referred to in the depositions of De Bray, Walsh, and Pressler, and said that it did not represent the relative positions of the surveys adjoining the Maximo Moreno survey; that the Arocha survey lies on the southeast line of the Moreno, adjoining it; that the Sanches lies east of the Arocha, and next to that on the east is the Pena, which is 13,750 varas southeast of the Moreno.

The witness Turner testified further that if you begun opposite the mouth of Lampasas, as called for in the field-notes, and follow the course and distance of the first line you will almost im-
38 mediately cross the river and recross it at 4,000 varas. In order to offset around this bend in the river the offset must be 500 or 600 vrs. If you reverse the calls in the grant running from the S. E. corner you run with an old marked line marked with blazes, being clearly marked to the hackberries, which were apparently made as early as 1833. Cow creek is reached at the distance called for in the field-notes; that the distance is exhausted in the middle of the creek. The place where the two hackberries stood is 560 vrs. beyond the distance called for in the grant for the N. E. corner, taking the course from the north line (reversed), the field-notes appearing in the grant call for two creeks on this line. One of them is within 70 varas of the distance stated in the grant; the other is some 500 out of place.

Taking the field-notes known as the Sawyer field-notes, the call on this line is for four streams from the N. E. corner. The first is reached at the distances called for. Between the first and second is also the right distance, but the difference between the second and third branch run west is too much. The difference between the third and fourth and between the fourth branch and the N. W. corner as claimed by plaintiff is the distances stated in these field-notes.

On the north line as claimed by the defendant there are only three creeks crossed, except two small branches, so small that they would not ordinarily be noticed, and none of them are in any way

near the distances called in any of the field-notes, and the western one of the streams called for on this line is crossed by the west line some 700 or 800 varas south of the N. W. corner as claimed by the defendant. The N. E. corner claimed by the plaintiff is in the bottom and timber of Cow creek, and the bottom and timber extend from this corner on the north line claimed by plaintiff to creek, the distance stated in the field-notes. From this N. E. corner,
39 where the hackberries stood, the bottom and timber extend to the corner of the east line northward about ½ or ¾ of a mile, when the course runs out on the highlands into the prairie, passing through some scattering timber to the N. W. corner claimed by defendant, which stands in a low flat prairie, some scattering timber around, and some stumps indicating that some of the timber had been cut. The place where this corner stands could not be said to be in the "timber of Cow creek."

At the point where the north line as claimed by defendant crosses Cow creek there is no bottom or timber on the east side. You cross the creek into the prairie at once. The marks which I saw on the line or near it on my former examination proved on my last examination by blocking in 1886 to be not over 20 or 25 years old, and so on the east line between the corners claimed by the plaintiff and defendant respectively the marks were not over 20 to 25 years old, and after leaving the two hackberries claimed by plaintiff such marks as we found had the line one degree east of the course of the line between the hackberries and the river runs. On the west line from the river to the N. W. corner no marks are to be found on the line except a few between the two points where the course of the line would cross the river and on the south side of the river.

The following plat exhibits the survey of said grant as claimed by the parties respectively.

(Here follows diagram marked p. 40.)

40 H. E. BRADFORD, witness for plaintiff, testified that he was district surveyor in Bell county in 1856; that at that time he ran the east line of the Moreno grant from the S. E. corner on the river and found it plainly marked with old blazes up to the two hackberries found by Bigham. These trees had plain blazes on them, and witness took them to be the N. E. corner of the Moreno grant. I saw McMillan, former district surveyor. David Ayers and others were with me when I made the survey referred to above, and McMillan pointed out to me the hackberry trees.

JOHN MARSHALL, witness for plaintiff, testified: Was with Sam. Bigham when he first ran around the Moreno grant according to its calls—according to course and distance; was also with the surveyor when he found the N. E. corner of the grant just as described in the field-notes—two small hackberries. We all took them to be the N. E. corner of the Moreno grant, and we were all satisfied that it was the northeast corner. We ran a line N. 70 W. from the two hackberries the distance called for, and found no marked line, but

we hunted for a marked line on both sides a distance of 3 or 400 vrs.; was with Sam. Bigham when he ran around the Moreno grant from the beginning corner and found no evidence of a marked line except one tree about 90 varas from the beginning corner, on the Leon river. We run the east line ¼ mile above the hackberries and found no marked trees, and we were thoroughly satisfied that the line stopped at the hackberries. This was in 1854.

—— HUNNICUTT, witness for plaintiff, testified: Am the county surveyor of Falls county; recently in company with plaintiff and his attorney, L. W. Goodrich, Esq., Harris, Turner, and Bigham; made an examination on the eastern and extreme northern line of the Moreno survey as claimed by the defendant, and blocked out
41 the marked trees, as stated by witness Turner, for the purpose of determining the age of the marks, and we found none that I considered to be older than eighteen years taken from above the hackberry corner, nor do I think they were as old as others we blocked out below the hackberry corner, which I thought were old enough to have been made in 1833. I determined the age by counting the growth, which I think is a proper test. We blocked all the trees on the lines that any one present claimed to be an old mark, and we only found one tree which, in my opinion, was marked, and that was near an old road and about 18 years old. The N. E. corner as claimed by defendant is in the prairie, with some scattering trees and stumps around it. It cannot be said to be in the timber. We searched on both sides of the north line as claimed by the defendant and found no marks older than 18 or 20 years.

F. H. AYERS, the defendant, L. MOORE, WEBB MOORE, for defendant, testified in substance that they were with the surveyor Turner and R. C. Bigham, witnesses for plaintiff, at the times in 1880 or 1881 when they were running and making their examinations on the eastern line. They followed that line from the lower river corner on its course N. 70 E. to the point of intersection of the north line at a distance of about 4,000 vrs. beyond the place where Bigham is said to have found the two small hackberries. Up to the place where Bigham is said to have found the two small hackberries the line is mostly through timber and is plainly marked with old blazes. From the hackberries northward on the course of the east line continued they found as many as six or seven trees with old blazes on them, apparently as old as any below the hackberries, and presenting no difference in appearance or age as compared with those below. The last tree found on this line was one elm tree within a few
42 varas of the point of intersection with the extreme north line as seen by Turner. After passing the Bigham corner, where it was claimed the hackberries had stood, the timber became scarcer, and about 1,000 vrs. the country became more prairie like and glady about the point of intersection, and along the line extended there were many stumps of trees that had been cut. In running this east line about 600 or 700 vrs. we passed the stump of a large ash tree directly on the line.

WILLIAM STEPHENS, a witness for defendant, testified: In December, 1859, as one of the heirs of T. L. Hood and as a representative of the Hood estate, I went on the eastern line of the Moreno grant for the purpose of effecting a compromise of a suit then pending in the district court of Bell county between David Ayers, the father of defendant, and the heirs of Hood, involving the location of the eastern line of the Moreno grant. S. W. Bigham and R. P. Bigham were along as surveyors. We first began on what was recognized as the east line of the Moreno grant, below the place where S. W. Bugham had claimed to have found the two small hackberries. From said point below we traced said east line to the place which Bigham pointed out to us where he had found the hackberries. These hackberries were not standing then. From that point we continued to trace the line on the same course and went about 1,000 vrs. to a point where we reached the open country. This line above the hackberry was marked as far as we went with blazes, these having the appearance of being old, and this line was adopted as the eastern line of the Moreno grant in making the compromise. The blazed trees we found above the hackberries, or the place where they had had stood, had the same appearance as to age as those below. I don't remember how many blazed trees we found on the line as far as we went. Witness was then seventeen years old and had
43 studied surveying, and understood it.

—— HANNA, witness for defendant, testified: Is a practical surveyor and followed the business for many years in Kentucky and about two years in Bell county; had been several times on the east line of the Moreno grant surveying, and had traced it several times from a point 500 or 600 vrs. below where the hackberry trees are said to have stood to its northern extremity as claimed by defendant. These tracings were made at different times, and all since the marked trees were blocked. A short time after the blocking I went on the ground for the purpose of examination. Mr. Lemly, the defendant, and the Moores were with me. Mr. Lemly took me to the ash stump referred to by him in his evidence. I then set my compass and ran the course S. 70 E. to a point about 500 or 600 vrs. below the place where the two hackberries are said to have stood, passing trees from which blocks had been cut. We then retraced the same line N. 20 E., passing the ash stump referred to, and further on, on the same course, we came to an elm tree which had been blocked within a few feet of the line. Lying by the tree was a part of the block, and about thirty varas off we found another piece of a block, and fitting them together—we fitted them in the tree and found they had been cut out of this tree, as they exactly fitted the place. This was the only block cut out of the trees that I found during the tracing of my line. The block now exhibited in court is the one I found. I have examined this block with the naked eye and with a magnifying glass to determine, if I could, from the growth since it was blazed the age of the blaze, and I concluded that the mark was either thirty-seven years old or fifty-three years old, depending upon whether the appearance of one portion was the

growth of one year of large and rapid growth, as might occur
44 in a wet year, or the growth of a series of dry years, which climate influences greatly effect. I do not consider the counting of the rings or growths a reliable test by which to determine the age of a mark on a tree; it is liable to be varied by so many causes—soil, climate, dry and wet seasons, the kind of tree, etc. I know of one tree marked as a corner tree, which is conceded to have been marked in 1834, and it is to-day, by measurement, one-tenth of an inch larger in diameter than it was when it was marked, according to the measurement and diameter given in the original grant. I refer to the same tree referred to by the witness Turner as found at the corner of the Duggan survey.

LUBBUCK MOORE, witness for defendant, also testified that he was with the surveyor Turner when, in 1880, he ran the north line of the Moreno survey, beginning at the point where the distance from the beginning corner gave out; and this witness testified the same in substance as the witness Turner concerning the finding of the blazed trees and their appearance as to age and position, with regard to the line and the finding of the dead hackberry tree at the point of intersection of the east line and the finding of the blazed elm tree near this point of intersection. It was proved that the defendant, at the time of the filing of this suit, was by tenant in possession of the W. W. Daws survey, and that the value of said tract in controversy in the suit was and is ten thousand dollars.

The witness Hunnicutt, the surveyor, examined the block produced by the witness Hanna and testified that in his opinion the mark on the block was not a surveyor's mark or made by an edged tool.

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45 Be it remembered that, this cause coming on for trial on this 1st day of May, 1890, the defendant, Frank H. Ayers, asked leave to file an amendment to his application for removal of this cause from the hon. district court of Bell county to this court, which amendment is as follows:

In Hon. U. S. Circuit Court, Northern District of Texas, at Waco.

A. E. WATSON
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FRANK AYERS.

Now comes Frank Ayers, defendant, leave of this honorable court first had and obtained, and amends his petition for removal of this cause from the hon. district court of Bell county on the — day of ——, 188–, and says that the matter and amount in dispute in the above-entitled suit at the time of the filing of said original petition

exceeded and now exceeds, exclusive of costs, the sum or value of ten thousand dollars, and there can be a final determination of the controversy in this suit, so far as he is concerned, without the presence of the other defendants or parties in this cause; that the controversy in said suit is between citizens of different States, and that the petitioner, the defendant in the above-entitled suit, was at the time of the commencement of this suit and at the time of the filing of his petition for removal of this cause to this court a citizen of the State of Mississippi, and that the plaintiff, A. E. Watson, was at the time of the commencement of this suit and at the time of said application to remove this suit to this court from said district court of Bell county and still is a citizen of the State of Texas, and this defendant has at no time since the institution of this suit been a citizen of said State of Texas.

And your petitioner prays as in his original application
46 for removal herein filed on — day of April, 1890.

D. W. DOOM.
JONES & KENDALL,
Att'ys for Defendant.

Which motion of the defendant the court overruled, and refused to allow said amendment to be filed; to which ruling of the court the defendant, by his counsel, then and there excepted and still excepts, and asks that the same be allowed as exception No. 1, and enrolled in this bill of exceptions, which is accordingly done.

Plaintiff offered in evidence a certified copy of the field-notes and a photographic copy of the same and the plat or sketch referred to in the evidence of witnesses Walsh, De Bray, and Presler, as follows:

Sunday, 21st, surveyed for Samuel Sawyer 11 leagues of land, beginning on the N. side of San Andres, opposite the mouth of Lampasas, at a pecan 18 in. diam., bearing N. 59 W. — vs. from a hackberry 24 in. and S. 34 W. 15.2 vs. from an elm 12 in.; thence N. 22 E. 22,960 vs. to the corner, a stake in the prairie; thence S. 70 E. 1,690 vrs. to a branch of Cow creek, 4,500 vrs. to 2nd branch, 8,000 vrs. to 3rd branch, 11,060 vrs. to Cow creek, 12,580 vrs. to the corner, two small hackberries; thence S. 20 W. 3,520 vrs. to Cow creek; 7,500 to N. W. corner of 2nd tract, a stake bearing N. 77 E. 93.3 vrs. from a hackberry 8 in. to Spring branch 23,640 vrs., 23,700 vs.; to bottom prairie 24,360 vs.; crossed same branch to the corner, a box elder, 26,400 vs., bearing S. 48 W. 7.2 vs. from a forked cottonwood 48 in., and S. 11 E. 16.4 vrs. from an elm 15 in.

STATE OF TEXAS, GENERAL LAND OFFICE,
AUSTIN, *July 6th*, 1885.

I, D. N. Robinson, chief clerk and acting commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a correct and sure copy of the last twelve lines of
47 page 166, pages 167, 168, 169, 170, 171, 172, 173, and first six lines of page 174 of Book C of original English field-notes, also known as F. W. Johnson's field book, forming part of the archives of this office.

In testimony whereof I have hereto signed my hand and caused the seal of the general land office to be affixed on the day and date last above written.

D. N. ROBINSON,
Ch'f Cl'k & Act'g Comm'r.

To the introduction of which in evidence defendant, by his counsel, objected, because, 1st, said sketch, field-notes, and plat had not been identified (as the field-notes, sketch, and plat had not been identified) as the work of the surveyor Johnson; 2nd, because it appeared from the evidence that said field-notes, sketch, and map, if the work of Johnson, had not been shown to have been filed in the land office prior to 1845, twelve years after the field-notes of the Maximo Moreno survey had been returned to said office; 3rd, because it was inadmissible by this testimony to contradict the official act and work of said surveyor in making the Maximo Moreno survey as done and returned by him to the land office; 4th, because said surveyor, Johnson, having testified in this suit in answer to interrogatories and cross-interrogatories propounded to him in 1878 and 1880, it was not competent as original evidence nor admissible to impeach or contradict the testimony of the witness; which objections the court overruled and admitted the testimony so objected to; to which ruling of the court the defendant then and there excepted and still excepts, and asks that the same be allowed as exception No. 2 and enrolled as such in this bill of exceptions, which is accordingly done.

Be it remembered that on this 8th day of May, 1890, came on to be heard def't's motion for a new trial in this cause, which, being considered by the court, was overruled; to which ruling of the court def't then and there excepted and gave notice of appeal to the Supreme Court of the United States, and to which ruling of the court def't still excepts, and asks that the same be allowed as a part of his bill of exceptions No. 3, and it is accordingly done.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

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The defendant in the above-entitled cause asks the court to charge the jury as follows: If the proof satisfies you that there are old blazes along the east line above the hackberries said to have been found by Bigham in 1854, and that such blazes extend to a distance of 4,000 varas, to the point of intersection with the course of the north or back line as run from the northwest corner as established by its calls, and that such back or north line is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then in that case you will find for the defendant.

D. W. DOOM,
JONES, KENDALL AND SLEEPER,
For Defendant.

Refused.
McCORMICK, *Judge.*

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 4, which is accordingly done.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

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vs.
F. H. AYERS.

The defendant asks the court to charge the jury as follows:

The jury are charged that the field-notes which entered into
49 and formed a part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field; that they will not consider any field-notes of a survey purporting to have been made for Sawyer unless the evidence should show that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title to Moreno; otherwise they will disregard the Sawyer field-notes and look only to the field-notes in the title issued to Moreno.

D. W. DOOM,
JONES, KENDALL & SLEEPER,
For Defendant.

Refused.
A. P. McCORMICK, *Judge*

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 5, which is accordingly done.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

A. E. WATSON
vs.
F. H. AYERS.

The defendant asks the court to charge the jury as follows: That if the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury cannot fix the northeast corner nor the back line by any other marks or monuments, then they shall fix it by the courses and dis-
50 tances of the first and second lines of the survey, except that the second line shall be extended so as to meet the recognized east line, as marked and extended beyond the hackberries, and in that case they shall find for the defendant.

JONES, KENDALL & SLEEPER,
D. W. DOOM, *Attorneys for Defendant.*

Refused.
A. P. McCORMICK, *Judge.*

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 6, which is accordingly done.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

A. E. WATSON
vs.
F. H. AYERS.

The defendant asks the court to charge the jury as follows:

That if the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury believe from the evidence that the Maximo Moreno survey was actually made on the ground by commencing at the beginning corner as called for in the grant and actually running out and tracing with a chain the upper or western line as called for (except the offset to avoid crossing the river), and that the northwest corner was fixed at a point on the course called for in the grant at the end of the northwest corner so established, the surveyor did actually run out and trace with a chain on the course called for to the northeast corner, they must find for the defendant.

51 JONES, KENDALL & SLEEPER,
D. W. DOOM, *Attorneys for Defendant.*

Refused.
A. P. McCORMICK, *Judge.*

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 7, which is accordingly done.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

A. E. WATSON
vs.
F. H. AYERS.

The defendant asks the court to charge the jury as follows:

It would not be proper to reverse the calls of the grant made to Maximo Moreno and to run in reverse course from the southeast corner for the purpose of ascertaining where the northeast corner would be found by the measurement called for in the grant if the evidence satisfies the jury that the surveyor actually began the survey at the corner called the beginning corner in the field-notes and from that corner ran and measured the western and northern lines on the ground.

D. W. DOOM,
JONES, KENDALL & SLEEPER,
Attorneys for Defendants.

Refused.
A. P. McCORMICK, *Judge.*

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exceptions No. 8, which is accordingly done.

52 On this evidence the court gave the jury the general charge as follows:

Charge of the Court to the Jury, Given on this the 2nd Day of May, 1890.

A. E. WATSON
vs.
F. H. AYERS *et al.* } No. 34.

By the admission of the defendant the plaintiff is entitled to recover unless the Maximo Moreno eleven-league grant extends over all or a part of the Daws one-third of a league.

The defendant assumes the burden of showing that said eleven-league grant does embrace a part of the land patented to Daws and owned by plaintiff. There is no question as to the validity of the title, except so far as it may be affected by a conflict of boundaries. There is no dispute between the parties as to the extent of the front upon Little river (St. Andrews), both the corners on the river being clearly ascertained and accepted by the parties, nor is there any question that the eastern line of said grant was clearly marked and is now certainly well known to have been run and actually marked for the distance of 26 or 27,000 varas, crossing Cow creek (now called Big Elm) at a given distance from the Little river mentioned in the original field-notes and found to correspond with the actual distance between those streams on said line.

The original field-notes do not call for any landmark at the intersection of the western line with the back or north line of the survey. At the intersection of the back line with the eastern line two small hackberries are mentioned as serving for a landmark to designate the corner.

Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty, and where he cannot be tracked on the ground

53 we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field-notes of the survey, and that marked trees, designating a corner or a line on the ground, shall control both course and distance. In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the "beginning" corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field-notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land em-

braced would most nearly harmonize all the calls and the objects of the grant.

There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant; and if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses Sam. & Pat. Bigham were the hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood N. 70 W. until it intersects the western line of said grant will bound the eleven-league grant upon the north, and if the Daws one-third of a league is situated wholly north of this line it does not conflict with said eleven-league grant, and you will find for the plaintiff.

If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark
54 for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began the survey at the "cotton-wood" corner (the S. E. corner) and marked and measured the east line and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line) — from this point where you find the footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line; and if this line so run will fall wholly south of the Daws survey you will find for the plaintiff.

If from the proof you are not able to fix the place where the two hackberries called for in the grant as a landmark to designate the N. E. corner of the Moreno grant then stood and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the foot prints left by the surveyor you will fix the boundaries of the Moreno grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line, extended on its course to the point of intersection with the extended second or north line; and if the north line so fixed will embrace in the Moreno grant any part of the Daws survey you will find for the defendant.

A. P. McCORMICK, *Judge.*

And the defendant, by his counsel, then and there excepted to all that portion of said charge as follows: "In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the 'beginning' corner
55 does not control more that any other corner actually well ascertained, nor are we constrained to follow the calls of the

grant in the order said calls stand in the field-notes there recorded, but are permitted to reverse the calls and trace the lines the other way and should do so whenever so doing the land embraced would most nearly harmonize all the calls and the objects of the grant," for the reason that the charge so given is not applicable to the state of facts proven on the trial of this cause; and the defendant, by his counsel, still excepts to the part of the charge above quoted and asks that the same be allowed as a part of his bill of exceptions No. 10, and it is accordingly done.

And the defendant, by his counsel, then and there further excepted to all that portion of said charge which reads as follows:

"If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original survey began the survey at the 'cotton-wood' corner (the S. E. corner) and marked and measured the east line and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line)—from this point where you find the footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line, and if this line so run will fall
56 wholly south of the Daws survey you will find for the plaintiff," for the reason that there was no proof showing or tending to show that F. W. Johnson, the surveyor who located the Moreno grant, began said survey at the "cotton-wood" or S. E. corner of said grant, and because the court erred in directing the minds of the jury to that corner rather than any other corner; and the defendant, by his counsel, still excepts to the part of the charge above quoted, and asks that the same be allowed as a part of his bill of exceptions No. 11, and it is accordingly done.

And the defendant, by his counsel, then and there further excepted to all that portion of said charge which reads as follows: "There is no dispute between the parties as to the extent of the front upon Little river (St. Andres), both the corners on the river being clearly ascertained and accepted by the parties, nor is there any question that the eastern line of said grant was clearly marked and is now certainly well known to have been run and actually marked for the distance of 26 or 27,000 varas, crossing Cow creek (now called Big Elm) at a given distance from the Little river mentioned in the original field-notes and found to correspond with the actual distance between those streams on said line," for the reason that said charge assumes as a fact that the eastern line of the Moreno grant run from the lower river corner, crosses Cow creek (now called Big Elm) at a distance from Little river, which is found to be the actual distance between those streams, which is a question of fact for the jury to determine from the evidence; and the defendant, by his counsel, still excepts to that part of the charge above quoted, and asks that the

same be allowed as a part of his bill of exceptions No. 9, and it is accordingly done.

57 And the defendant, having made, by his counsel, the several exceptions hereinbefore set forth, numbered 1, 2, 3, 4, 5, 6, 7, 8, and nine, to the rulings of the court and still adhering thereto, asks that this his bill of exceptions may be signed, which is accordingly done, that the same may become part of the record as such, this 10th May, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

Filed May 10th, 1890.

J. H. FINKS, *Clerk.*

58 Know all men by these presents that we, F. H. Ayers, as principal, and E. J. Morgan and D. R. Wade, as sureties, are held and firmly bound unto A. E. Watson, appellee, in the full and just sum of five hundred dollars, to be paid to the said A. E. Watson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand eight hundred and ninety.

Whereas, lately, at a regular term of the circuit court of the United States for the northern district of Texas, at Waco, in a suit depending in said court between A. E. Watson, as plaintiff, and F. H. Ayers *et al.*, as defendants, a judgment was rendered in favor of the plaintiff in the said circuit court, on the 2nd day of May, 1890, against the said F. H. Ayers *et al.*, the said suit being designated as No. 34 on the records of said court, and the said F. H. Ayers having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. E. Watson, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said F. H. Ayers *et al.* shall prosecute *his* writ of error to effect and answer all damages and costs if *he* shall fail to make *his* plea good, then the above obligation to be void; else to remain in full force and virtue.

F. H. AYERS. [SEAL.]
D. R. WADE. [SEAL.]
E. J. MORGAN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
A. P. McCORMICK,
U. S. Dist. Judge, N. D. Texas.

[Endorsed:] 34. A. E. Watson *vs.* F. H. Ayers *et al.* Writ of error bond. Filed June 2nd, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between A. E. Watson, plaintiff, *vs.* F. H. Ayers *et al.*, defendants, a manifest error hath happened, to the great damage of the said F. H. Ayers and John R. Hall, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29 day of May, in the year of our Lord one thousand eight hundred and ninety.

J. H. FINKS,
Clerk of the Circuit Court of the United States,
Northern District of Texas,
By C. A. RICHARDSON, *Deputy.*

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] # 34. A. E. Watson *vs.* F. H. Ayers *et al.* Writ of error. Filed June 2nd, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

60 *Citation.*

The United States of America to A. E. Watson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the fifth circuit court of the United States for the northern district of Texas, at Waco, wherein F. H. Ayers and J. R. Hall are plaintiffs in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Andrew P. McCormick, judge of the district court of the United States for the northern district of Texas, holding sessions for the 5th circuit court of the United States at Waco, for said district, this fourth day of August, in the year of our Lord one thousand eight hundred and ninety.

A. P. McCORMICK,
[SEAL.] *U. S. District Judge.*

Test, with the seal of court, at Waco, Texas, this 8th Aug., 1890.

J. H. FINKS,
Clerk U. S. C. C.

As att'y- of record for defendant in error in the cause in which the foregoing citation is issued we hereby accept services and agree that the case shall be docketed at the October term of the Supreme Court of the United States, A. D. 1890, and stand in all respects as — we and the defendant in error had been duly served with said citation.

GOODRICH & CLARKSON.

Filed Aug. 19, '90.

J. H. FINK, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

61 F. H. AYERS *et al.*, Plaintiffs in Error,
vs.
A. E. WATSON, Defendant in Error. } Assignment of Errors.

The plaintiffs in error assign the following as the errors committed by the circuit court of the United States for the northern district of Texas, at Waco, as appears from the records and proceedings in said cause:

1st. There is error in this, to wit, that the court overruled the motion of plaintiff- in error to amend *his* application for the removal of this cause from the district court of Bell county to the hon. U. S. circuit court for the northern district of Texas, at Waco, and refused to allow said motion to amend to be be filed, as shown in bill of exceptions No. 1.

2nd. The court erred in permitting defendant in error to offer and read in evidence the certified copy of the field-notes and the photograph copy of same and the plat or sketch referred to in the evidence of the witnesses Walsh, De Bray, and Pressley, as shown by bill of exceptions No. 2.

3rd. The court erred in overruling the motion of the plaintiffs in error for a new trial, as shown by bill of exceptions No. 3.

4th. The court erred in refusing to give to the jury the charge asked by plaintiffs in error shown by bill of exceptions No. 4.

5th. The court erred in refusing to give to the jury the charge asked by the plaintiffs in error as shown by bill of exceptions No. 5.

6th. The court erred in refusing to give to the jury the charge asked by plaintiffs in error as shown by bill of exceptions No. 6.

7th. The court erred in refusing to give to the jury the charge asked by plaintiffs in error as shown by bill of exceptions No. 7.

8th. The court erred in refusing to give to the jury the charge asked by the plaintiffs in error as shown by bill of exceptions No. 8.

62 9th. The court erred in its charge to the jury in that part of its charge in which it assumes that there is no dispute about the measurement of the east line, shown by bill of exceptions No. 9.

10th. The court erred in its charge to the jury in that part of the charge with reference to reversing the calls in the grant, as shown by bill of exceptions No. 10.

11th. The court erred in its charge to the jury in that part of its charge directing the jury with reference to the location of the survey by beginning at cotton-wood on S. E. corner, as shown by bill of exceptions No. 11.

Wherefore plaintiffs in error pray that the judgment of said circuit court may be reversed and the cause remanded for a new trial.

D. W. DOOM,
JONES, KENDALL AND SLEEPER,
Att'ys for Pl'ffs in Error.

Endorsed: No. 34. F. H. Ayers *et al.*, plaintiffs in error, *vs.* A. E. Watson, defendant in error. Assignment of errors. Filed August 29, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

63 UNITED STATES OF AMERICA, } *ss:*
Northern District of Texas, }

I, J. H. Finks, clerk of the circuit court of the United States, fifth circuit, in and for the northern district of Texas, do hereby certify that the foregoing and attached sixty-three pages of writing, numbered on the margin of same from 1 to 63, inclusive, contain a full, true, and correct copy of the record and proceedings in case No. 34, entitled A. E. Watson *vs.* F. H. Ayers *et al.*, as the same appears on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Waco, on this the 29th day of August, A. D. 1890.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

[Endorsed:] U. S. circuit court, northern district of Texas, at Waco. 34. A. E. Watson *vs.* F. H. Ayers *et al.* Transcript.

Endorsed on cover: N. Texas C. C. U. S. No. 1356. F. H. Ayers and J. R. Hall, plaintiffs in error, *vs.* A. E. Watson. Filed October 7, 1890.

Office Supreme Court U. S.
FILED,
DEC 1 1890
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM 1890. No. 1356.

F. H. AYERS and J. R. HALL, Plaintiff-in-Error,

vs.

A. E. WATSON, Defendant-in-Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFF-IN-ERROR.

WM. E. EARLE,
Attorney for Plaintiff in Error.

Kellogg Building,
Washington, D. C.

M'QUEEN, PR.

Supreme Court of the United States.

OCTOBER TERM, 1890.

F. H. AYERS *et al.*, Plaintiffs-in-Error,
vs.
A. E. WATSON, Defendant-in-Error.
} No. 1356.

This is an action of ejectment brought by Watson, the original plaintiff, in the District Court for the County of Bell, in the State of Texas, and afterwards removed into the Circuit Court of the United States for the Northern District of that State. It has been twice tried before juries which failed of agreement; twice the verdict has been for the plaintiff and the judgment has been reversed by this court (see 113 U. S., 594 and 132 U. S., 394), and after a fifth trial it is now before the court for the third time for alleged errors in the admission of evidence and in the instructions to the jury.

The plaintiff below, Watson, claimed the land in dispute under a grant to the heirs of one Daws for a third of a league, and the question at issue was whether the Daws grant was within the limits of an older grant known as the "Moreno Grant" for 11 leagues. It was therefore a mere question of locating the Moreno grant upon the ground, and it does seem that if the plain rules laid down by this court on the first hearing and reaffirmed on the last had been followed the confusion into which the court has fallen would have been avoided. We shall demonstrate to the court that incompetent evidence which was confusing and misleading was admitted in derogation of the opinion which was rendered in the cause.

The sole issue in the cause is the location of the Moreno Eleven-League Grant, and the question of location is indeed narrowed to whether the Bigham two hackberries is the true northeast corner. If the survey began at the southwest corner, then the Bigham hackberries are not the northeast corner; but if the survey began at the southeast corner, then the Bigham hackberries *may be* established as the northeast corner. The surveyor and the chain-bearer testify positively that they began at the southwest corner; hence the effort to contradict them by notes of the Sawyer survey in order to enable the jury to begin locating the survey at the southeast corner. And the erroneous admission of these notes and map constitute an important factor in this case.

Observations on the Evidence.

Surveyor Johnson testifies that "the corner and bearing trees, where there were such, were marked with blazes, with two hacks above and below." The Bigham hackberries were in timber (f. 39), but there are no bearing trees. The hackberries are marked with blazes on the inside facing each other, and the line from the northeast corner would pass between them (ff. 31, 32, 33). From the hackberries to the west line there is no marked line and no marked trees. (Ff. 30, 32, 40.)

The upper and lower corners on the river, as called for in the Maximo Moreno Eleven-League Grant, are admitted by both parties, and these corners are not in dispute. We admit that the area embraced in the lines of the original survey of 1833, whereon our grant is based, exceeds 11 leagues, but our contention is that if the grant can be located by following the footsteps of the surveyor, then the amount of land in it becomes immaterial. That the footsteps of the surveyor can be followed is abundantly shown by the Record—

The original survey of the Moreno grant, made in 1833, commenced at the upper or southwest corner on the Little river, and running the course and distance called for in the grant to the northwest corner, and thence to the northeast corner, where two small hackberries stood for the northeast corner, from thence to the lower corner on the Little

river. This line was run on the ground and marked with blazes, but not measured. (Record, f. 25.)

That the west and north lines were run and actually measured on the ground, and the southwest as the beginning corner is established and proven; and that the east and south lines were run and marked, but *not measured*. (Record, ff. —.)

Offset after leaving the beginning corner, to avoid crossing the Leon river. (Record, f. 25, 26.) The field-notes stating: "Beginning the survey at a pecan, and a line was run to the north 22 degrees east, 22,960 varas, and planted a stake in the prairie for the second corner, etc." (Record, f. 6.)

The upper and lower river corners of the Moreno grant admitted to be extant as called for in the Moreno grant. (Record, f. 24.)

There is no dispute as to the extent of the front on Little river—the south line. (Record, ff. 36, 37.)

The pecan and bearing trees mentioned in the field-notes are found at the three forks or mouth of Lampasas river, southwest corner, and the western line has one mark, about 90 varas from the beginning. (Record, f. 31.)

The first survey made in the locality was the Moreno 11-league survey. (F. 24.)

Positively began Moreno survey at the mouth of the Lampasas river, and ran the lines as stated in the field-notes. (Chain-bearer, f. 26.)

Both the first and second lines were measured on the ground. (Record, ff. 25, 26.)

The line from the southwest corner was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. (Record, f. 24.) From the northwest corner thus established (by measurement) the second line was run the course and distance called for in the grant. (Record, f. 25.)

In 1885 there was an old line pointed out to me as the north line of the Moreno survey at or near where the defendant claims it to be. (Ff. 26, 27.)

The point of intersection of north and east lines was 2 varas from a tree marked with old blazes. Within a few feet of this point of intersection of north and east lines found body of hackberry tree marked with an old blaze which had fallen down. (Surveyor Turner, Record, f. 37.) There was a small branch near the point of intersection above mentioned. (Record, f. 37.)

On the east line the distance as measured on the ground, from the northeast corner to a creek called for in the grant it was admitted was some 4,000 varas more than the distance called for. The distances on that line were not measured in the original survey, but guessed at. No part of the east line was measured. (Record, f. 25.)

There is no dispute as to the eastern line from the lower river corner to the so-called Sam Bigham hackberries, (Record, ff. 36, 37.)

On the east line, above the Bigham hackberries, run as called for in the grant reversed, was a marked line, several trees—as many as six trees—marked with blazes. (Turner's testimony, Record, ff. 41, 43.)

Marked line for 1½ miles, on east line above the so-called Bigham hackberries, marked with blazes of the same age apparently as below the Bigham hackberries. (Record, ff. 28, 33, 36, 42, 43.)

Surveyor Turner, witness for defendant Watson, testifies that he "traced a line for about 4,000 varas" above the Bigham hackberries. (Record, p. 36.)

Several lines were run from the Bigham hackberries on the east line to the west line (from the beginning southwest corner to the northwest corner in the prairie), but no old line nor any marked trees were found by anybody. (Bigham, f. 32.)

The Bigham northeast corner, claimed by the plaintiff Watson, is marked by inside blazes facing each other, and the east line would pass between them. (Ff. 31, 32.)

In 1885 there was an old blazed north line at or near where the defendant (plaintiff in error) claims it to be. (Ff. 26, 27.)

On cross-examination, Surveyor Johnson testified:

"I began at the southwest corner, at the three forks at the mouth of the Lampasas, and autually traced the lines in the order set forth in the field-notes as hereinbefore stated." (Record, p. 25.)

Chain-bearer Doty testified:

"I know positively that we began the Moreno survey at the mouth of the Lampasas river, and ran the lines as stated in the field-notes. I have a very distinct recollection of this survey. (Record, p. 26.)

It appears, then, to state our case briefly, that the two corners on the river are admitted, and the line between them, and the western line from A to B is necessarily established by course and distance, sustained to a certain extent by one mark about 90 varas from the Little river. (Record, f. 31.) The northern or back line we consider established by the finding of "old blazes" along the line of the same age apparently of the blazes on the eastern line. (Turner's evidence, Record, p. 22.) Along this line he found three trees marked with old blazes, and a few varas from this point of intersection found a tree marked with an old blaze at the east line, within a few feet of this point of intersection. Also found a part of the body

of a hackberry, which had rotted. (Record, f. 36, 37.) From the intersection of the northern or back line is a blazed line to the lower river corner D. The eastern line from the two hackberries, known as the "Bigham corner" to the lower corner, being admitted.

In the face of this strong case, as we insist, in favor of the location of the lines of the Moreno grant, we find the principle obstacle to be the contention of the defendant-in-error that the eastern line terminates at the two hackberries known as the Bigham corner. This objection is, we submit, without a particle of force. It is condemned beyond controversy.

First. The evidence is conclusive that the eastern blazed line, the mark peculiar to 11-league grants, extends for 1½ miles north of this so-called Bigham corner. (Record, ff. 33, 36, 37.)

Second. Rucker, surveyor, failed to find any marked trees on the line he ran between the so-called Bigham corner and the western line (Record, f. 30), though the so-called Bigham hackberry corner was in a thick-wooded country. (Record, f. 38, 39.)

Third. The Bigham corner is condemned by the marked lines and intersection corner of the north and eastern lines found by Turner. (Record, f. 36.)

Fourth. It is condemned by the course and distance of the western and north lines.

Fifth. There are no bearing trees to witness the fact that the two Bigham hackberries are corner trees, and no marks or lines to west line. (Ff. 30, 32, 40.)

From the view of the evidence we have been considering, and other undisputed facts in the case, we submit that the condition of the case is as follows:

1. The two corners on the river are admitted, and also the line between them called the south line.

2. The eastern line is admitted as far as the so-called Samuel Bigham hackberry corner.

Beyond that point it is established up to the letter C on the diagram by the uncontradicted evidence of the surveyors, Turner and R. P. Bigham.

We assume, then, that the eastern line is established from the lower river corner to the intersection with the north or back line, as claimed by the plaintiff-in-error. Its length is immaterial. Johnson and Duty say it was run but not measured. As the west and east lines hang from the back line at right angles the latter is necessarily longer than the former, as the river bends to the south as it runs east.

The First Assignment of Error

is as follows:

1st. There is error in this, to wit, That the court over-ruled the motion of plaintiff-in-error to amend his application for the removal of this cause from the District Court of Bell county to the Honorable United States Circuit Court for the Northern District of Texas, at Waco, and refused to allow said motion to amend to be filed, as shown in bill of exceptions No. 1.

The cause was removed to the federal court by the defendant below in due time, and when it was first here on writ of error a motion to remand was made by him as plaintiff-in-error and refused. (See 113 U. S., 594.) On the last hearing a defect in the petition for removal was suggested by a member of the court, but after reference to the former action of the court the hearing was ordered on.

After the last hearing here, to wit, on the 1st of May, 1890, the plaintiff-in-error as defendant below filed a motion to amend his application for removal, which said motion the court over-ruled, and an exception was duly noted. (Record, p. 34.)

The motion was a proper one, and it seems curious that it should have been refused, since it could not have prejudiced the plaintiff after the first hearing in this court, whereon he resisted the effort to remand the cause to the State court. The question of jurisdiction having been decided by this court, the plaintiff below could have no advantage by his effort to reopen the question. Both parties are estopped by their respective action as regards that question.

Second Assignment of Error

is as follows:

2d. The court erred in permitting defendant-in-error to offer and read in evidence the certified copy of the field-notes and the photograph, *i. e.*, copy of same, and the plat or sketch referred to in the evidence of the witnesses Walsh, De Bray and Pressley, as shown by bill of exceptions No. 2.

The plaintiff offered in evidence a certified copy of the field-notes and a photographic copy of the same and the plat or sketch of the survey of 11 leagues of land made for one Samuel Sawyer, which was referred to in the evidence of the witnesses Walsh, De Bray and Pressly, and to their introduction the following objection was then taken, was overruled, and an exception duly noted which is now assigned for error:

"To the introduction of which in evidence defendant, by his counsel, objected, because, first, said sketch, field-notes, and plat had not been identified (as the field-notes, sketch, and plat had not been identfied) as the work of the surveyor, Johnson; second, because it appeared from the evidence that said field-notes, sketch, and map, if the work of Johnson had not been shown to have been filed in the Land Office prior to 1845, twelve years after the field-notes of the Maximo Moreno survey had been returned to said office; third, because it was inadmissible by this testimony to contradict the official act and work of said surveyor in making the Maximo Moreno survey as done and returned by him to the Land Office; fourth, because said surveyor, Johnson, having testified in this suit, in answer to interrogatories and cross-interrogatories propounded to him in 1878 and 1880, it was not competent as original evidence nor admissible to impeach or contradict the testimony of the witness; which objections the court overruled and admitted the testimony so objected to; to which ruling of the court the defendant then and there excepted and still excepts, and asks that the same be allowed as exception No. 2 and enrolled as such in this bill of exceptions, which is accordingly done.

"Be it remembered, that on this 8th day of May, 1890, came on to be heard defendant's motion for a new trial in this cause, which, being considered by the court, was overruled; to which ruling of the court defendant then and there excepted and gave notice of appeal to the Supreme Court of the United States, and to which ruling of the court defendant still excepts and asks that the same be allowed as a part of his bill of exceptions No. 3, and it is accordingly done."

The defendant read in evidence the depositions of F. W. Johnson, taken in *this* case in 1878 and 1880, estab-

lishing these facts beyond question, and herein he was corroborated by the chain-bearer, the witness William Duty. He was the principal surveyor of Austin's colony, and testifies that the Maximo Moreno 11-league survey was the first made, and he explains that in running the west line he made an offset to avoid crossing the Leon river, and states other minor details, so that it is beyond peradventure that he was not mistaken as to running the west line from the " point opposite the mouth of the Lampasas river." This testimony was taken with the deliberation of a deposition. He was cross-examined, and in answer to questions on cross-examinations he said he *did not* begin at the *southeast* corner, but *began at the southwest* corner, and actually traced the lines *in the order* set forth in the field-notes. If there had been any question as to the truth of his testimony, as confirmed by the recitals in the grant and as corroborated by the chain-bearer, he could have been recalled for cross-examination to lay the foundation for contradicting him. There was no suggestion of the sort. He died in 1884. The first writ was argued in this court November 11 of that year.

In rebuttal the plaintiff Watson was permitted to introduce the evidence excepted to, and this is assigned for error.

If this evidence was introduced to contradict the witnesses Johnson and Duty, both of whose testimony was taken by deposition in 1880, it should have been introduced then on the cross-examination, or else during the four years of Johnson's life between 1880 and 1884 he should have been recalled for further cross-examination to lay the foundation for this contradiction, and his attention being called specifically to what was to be brought forward for the purpose of contradicting him with particularity as to time and place and circumstances, he should have had an opportunity of denying it, or of making such explanation as would tend to reconcile any real or seeming conflict; but no such opportunity was had. Four years of his life passed away with this book in the public office, and when death had sealed his lips and cut off all possible explanation, the book is exhumed and thrust into the case in derogation of the most familiar and

soundest rules of evidence. (Greenleaf on Evidence, secs. 462, 464.)

The copy of field-notes and the photographic copy of same and the plat or sketch described in the second bill of exceptions and second assignment of error are unquestionably obnoxious to the principles fully enunciated in the last opinion of this court. In it this court said:

> "In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objectionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation intended to reconcile what he formerly said with what he is now testifying."

If these copies were introduced as original evidence by the plaintiff they were clearly incompetent for another reason. This book C is not a public record. It is found in the General Land Office, and the tradition is that it has been there a long time, and it is believed to be in the handwriting of Surveyor Johnson, but it is not an archive of the General Land Office. It is expressly decided that an archive of the General Land Office must have been an archive of some other office. (See Paschal *vs.* Perez, 7 Texas, 348.) This book of field-notes is the mere private memorandum of some surveyor, and assuredly does not become an archive by being deposited in the General Land Office, since no law requires it to be deposited in the General Land Office. The field-notes officially signed and required to be incorporated in the original title, the grant, are in law the archive. The admission of these copies, or of this book, illustrates the viciousness of the loose practice of allowing incompetent evidence to go to the jury "for what it is worth." If the Bigham hackberries were not determined at the northeast corner then there can be no difficulty in locating the grant, and in exact accordance with the field-notes of the grant, and this evidence in nowise bore upon the identity of the Bigham hackberries at the northeast corner.

We must, however, frankly bring to the attention of the court the fact that in the case of Ayers *vs.* Harris

(77 Texas, 115), relating to another contest under this grant, the Supreme Court of Texas held that this book was competent, and uses the following language:

"Even if it can not strictly be held an archive of the General Land Office, and admissible as such, it was clearly proved in this case to be a memorandum of the survey made by the surveyor at the time the work was done, and as such we think it was clearly admissible to aid in proving the actual footsteps of the surveyor when making the survey."

In the case at bar, however, the surveyor and the chainbearer have directly and positively sworn to the line of their footsteps in making this survey.

On reading this opinion in connection with that delivered by Mr. Justice Miller for this court, in 132 U. S., we receive a stronger impression of the wisdom of affording a Federal tribunal to non-residents in which to protect their rights, especially when large areas of real estate are involved. It is to be regretted that the Circuit Court for the Northern District of Texas is not sufficiently removed from local influences to enable it to follow the plain principles laid down by this court in the two opinions heretofore rendered in this case.

The laws of the State do not *proprio vigore* affect the powers or control the jurisprudence of the Federal courts. In the domain of general jurisprudence, as well as under the laws of Congress, the Federal judiciary is neither controlled nor trammeled by the local laws of the States. The laws of the State may not be obnoxious to the Federal Constitution, and yet they may not affect or govern the rights of non-residents. What we mean is well illustrated by the cases of Sturges *vs.* Crowninshield, 4 W.; Bank of United States *vs.* Halstead, 10 W., 51, and Ogden *vs.* Sanders, 12 W. The ruling of the Supreme Court of Texas, above quoted, as to the admissibility of these copies from book C is not a rule of decision coming within section 34 of the Judiciary Act, but it belongs to the domain of general jurisprudence. Congress has always manifested a distinct purpose to leave it so by carefully avoiding the adoption of the rules of evidence of the different States, and to avoid the possibility of such an inference, in the act of June 1, 1872, "to further the administration of justice," it expressly provided that nothing therein

contained shall alter the rule of evidence in the courts of the United States.

It was not only incompetent thus to contradict the surveyor and the chain-carrier, and incompetent as original evidence, but in addition thereto the testimony utterly fails to connect these documents with the Moreno 11-league grant, the subject of this suit, and John W. Turner, a surveyor of Bell county, and the plaintiff Watson's witness (Record, f. 37, p. 29) testifies:

> "On cross-examination witness was shown the map introduced in evidence by plaintiff and referred to in the depositions of De Bray, Walsh, and Pressler, and said that it *did not represent* the relative positions of the surveys adjoining the Maximo Moreno survey; that the Arocha survey lies on the southeast line of the Moreno adjoining it; that the Sanches lies east of the Arocha, and next to that on the east is the Pena, which is 13,750 varas southeast of the Moreno."

Now, upon reference to this map, which is in the Record as f. 34, it will appear that the Pena survey lies to the east and adjoining the Maximo Moreno grant, whereas the witness testifies that it is 13,750 varas removed, with the Arocha survey and the Sanches survey lying between it and the Moreno. Clearly this documentary evidence is disconnected from the subject-matter of this suit, and incompetent for that reason, even if there had been no other objection. Its admission only tended to confuse and mislead the jury.

Third Assignment of Error

is based upon the third exception, which relates to the refusal of the motion for new trial, which motion is set out on p. 19 of the Record, beginning at f. 21. The first two grounds of the motion are that the verdict is contrary to the law and the evidence. The law required the location to be made by following the footsteps of the surveyor where that could be done. The surveyor and chain-bearer had testified positively that in 1833 they began this survey at the admitted southwest corner, running and measuring on the ground the west and north lines, the courses and distances named in the field-notes in the grant. That corner had been found, and it was marked

as they said it was. About 90 varas therefrom on the west line, run as they testified it had been run, there was found a marked tree. They both testified to making a set-off to avoid crossing the Leon river. The north line was found marked as they testified they had run and measured it on the ground. Near where this line, run as they testified they had run it, would have intersected with the east line, surveyor Turner (a witness for plaintiff Watson) in 1880 found "a tree marked with an old blaze on the east line within a few feet of this point of intersection. Witness also found at this point a part of the body of a hackberry tree which had rotted." Also a small branch north and east of the point of intersection. And from the point of intersection a number of witnesses found the east line marked down to the Bigham hackberries, and the testimony is that the east line would have passed through the Bigham hackberries, and, moreover, that these hackberries were marked with blazes *on the inside, facing* each other.

Now, here were the footsteps of the surveyor identified by direct testimony and verified by the marked lines found 57 years afterwards; and when this case was here in March, 1885, this court said that the jury should have been told "that if the testimony was not sufficient to identify the two hackberries with those called for in the grant, and could not fix the northeast corner nor the back line by any other marks or monuments, then they should fix it by the courses and distances of the first and second lines of the survey, except that the second line should be extended so as to meet the recognized east line as marked and extended beyond the hackberries."

With this conclusive testimony as to the footsteps of the surveyor, resting as it does upon the direct testimony of two witnesses and corroborated by the marked lines, it does not seem to require argument to prove that the verdict for the plaintiff was contrary to the facts.

It was manifestly contrary to the principles and rules of law laid down by this court as applicable to the case.

The rule of location to follow the footsteps of the surveyor, if that can be done with certainty, is absolute and without exception. Those footsteps were fixed with ab-

solute certainty by the testimony of the surveyor (Johnson) and by the chain-bearer (Duty). The purpose of introducing the notes, etc., from the General Land Office on the last trial, just as was the purpose of introducing the depositions of 1860 on the former trial, was solely to impeach the testimony of the surveyor (Johnson) and the chain-bearer (Duty), and the question of the competency of such testimony for this purpose was fully considered in the last opinion of this court.

For these and the other reasons assigned in the motion for a new trial there was manifest error in the refusal of the new trial; but the grounds of this motion will be more fully considered under other assignments.

Fourth Assignment of Error

is based upon the refusal to grant the following prayer:

"If the proof satisfies you that there are old blazes along the east line above the hackberries, said to have been found by Bigham in 1854, and that such blazes extend to a distance of 4,000 varas, to the point of intersection with the course of the north or back line as run from the northwest corner as established by the calls, and that such back or north line is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then in that case you will find for the defendant."

There was not only proof tending to establish each fact stated in this prayer, but except for the introduction of the Sawyer field-notes and map, which were incompetent, there was no conflicting evidence. These facts constituted the primal and material facts relating to the location of the Moreno grant, for they exactly accord with the field-notes thereof; and they exactly accord with the testimony of the surveyor and chain-bearer as to the line of their footsteps in making the survey. The court in the charge given incidentally admits that the east line is marked a greater distance than is called for in the grant as its length, and Surveyor Turner testified that he traced it 4,000 varas above the Bigham hackberries.

Then if these facts were found by the jury it would, according to the testimony of the plaintiff Watson's witness, Sam Bigham, have included most of the Daws sur-

vey in the Moreno grant (R., p. 32). If the jury found the facts as recited in the prayer, the defendant was unquestionably entitled to the verdict. When the prayer is carefully read it will be curious to see the argument which can be adduced to explain its refusal.

If this prayer had been fairly given there would be no substantial objection to the concluding portion of the charge as given by the court; but, this prayer being refused, the statement of the plaintiff's theoretical case in the last paragraph of the charge assumes that the jury could not fix the place where the two hackberries, called for in the grant as a landmark to designate the northeast corner of the Moreno grant, stood. Whereas the plaintiff's witness, Turner, found old blazes on the north and east lines, and also "found a tree marked with an old blaze on the east line within a few feet of this *point of intersection.* (R., p. 37.)

We respectfully submit that there was manifest error in the refusal of this prayer and in the charge as given, and that in said refusal we were done material injury, whilst the last paragraph of the charge draws the minds of the jury from the real issue in the case and suggests a difficulty which was not possible with due regard and consideration of the proven facts.

The Fifth Assignment of Error

related to the refusal of the following prayer, to wit:

"The jury are charged that the field-notes which entered into and formed part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field; that they will not consider any field-notes of a survey purporting to have been made for Sawyer unless the evidence showed that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno, and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title of Moreno; otherwise they will disregard the Sawyer field-notes, and look only to the field-notes in the title issued to Moreno."

This does not relate to the competency of this testimony. That question is considered elsewhere. But if the evidence were competent, and further, if the notes of

the Sawyer survey were properly proven, then the question arises, What is their legal value and bearing upon the issues involved in this case? The Sawyer field-notes and map might have been gotten into the case by properly producing them on the taking of either of Johnson's depositions and cross-examining him in relation to them, and still the present question as to their value and effect as legal testimony would have arisen, and this prayer, in the form in which it is presented, would have been not only germain, but pertinent and proper. To refuse the prayer was to tell the jury that they might substitute these bastard Sawyer field-notes as the true field-notes of the Moreno grant in the place of those incorporated in said grant and testified to by Johnson and Duty.

Sixth Assignment of Error

relates to the refusal of the court to grant the following prayer, to wit:

"That if the testimony is not sufficient to identify the two hackberries claimed by the plaintiffs as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury can not fix the northeast corner, nor the back line by any other marks or monuments, then they shall fix it by the courses and distances of the first and second lines of the survey, except that the second line should be extended so as to meet the recognized east line as marked and extended beyond the hackberries, and in that case they shall find for the defendant."

This prayer is in *totidem verbis* the language of this court when the case was first here. (See 113 U. S., 607, bottom.) It was not only refused, but the judge, in the first of the two stated cases (f., 18) in which the jury should find for the plaintiff, told the jury that proof having been given them "tending to show where the two hackberries called for as the intersection of the east and north lines of the grant actually stood *at a distance from the lower corner on the river*, corresponding to the length of the east line," and if it satisfied them that the Bigham hackberries were the two "called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where the two hackberries stood north 70 west (reversing the north line as testified to

by the Sawyer and as laid down in the grant) until it intersects the west line of said grant will bound the 11-league grant upon the north, and if the Daws one-third of a league is situated wholly north of this line, it does not conflict with said 11-league grant, and you will find for the plaintiff."

This charge was not only strongly argumentative, but it made the length of the unmeasured east line the test of the location of the grant and left to the jury no discretion, and it authorized them to establish a new north line where nobody had found a line or a marked tree in the place and stead of the north line which plaintiffs' surveyors had found well marked, as Surveyor Johnson had testified he had marked it fifty-seven years before. Nevertheless if this charge prayed for by the defendant in the terms that this court said it should be had been given, the vice of the charge of the judge would have been cured, and the jury could have located the grant by the courses and distances of proven and established lines instead of making a new line where no marked tree was to be found by any of all the surveyors the plaintiff had employed to find one.

In refusing this prayer the judge fell into a further error in the second case stated by him in his charge as one upon which the jury should find for the plaintiff, by charging, instead of the prayer, that if they did not find that the Bigham hackberries were the corner at the intersection of the north and east lines and the whole proof satisfies you that the surveyor began at the southeast corner, you should follow *these footsteps* of the surveyor, and from the point where you find his footsteps stop "run a line north 70 west to the west line for the north or back line, and if this line so run will fall wholly south of the Daws survey you will find for the plaintiff."

In this stated case in this charge the judge admits parenthetically that the east line is marked for a greater distance than is called for in the grant as its length, and directs them that they shall from that point run a line north 70 west (reverse course of the established back line) for the north or back line "and if this line so run will fall wholly south of the Daws survey you will find for

the plaintiff"; but there is not an iota of testimony in the case to show where the plaintiff's survey (Daws') would be in relation to such a line, for the testimony only showed that a line from the Bigham hackberries to the west line would exclude the Daws survey whilst Johnson's north line included it. Consequently the case was without proof tending to show a state of facts to which the charge could be made applicable, and the jury was thrown back upon the Bigham corner instead of being left free to locate the corner at that intersection of the north and east lines "by the courses and distances of the first and second lines of the survey," as this court says they should be charged to do, and as our prayer asks they should be instructed.

On reference to pp. 602 to 606 of 113 U. S. it will be seen that the judge has here given substantially the charge there criticised, and very much in the same language, except that he does not tell them now, as he then did, that they must follow the tracks of the surveyor, "and where he can not be traced on the ground we have to follow the course and distance he gives," and he refuses to give the charge directed by this court at the bottom of p. 607 of 113 U. S.

Seventh Assignment of Error

relates to the refusal to grant the following prayer, to wit:

"That if the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury believe from the evidence that the Maximo Moreno survey was actually made on the ground by commencing at the beginning corner, as called for in the grant, and actually running out and tracing with a chain the upper or western line, as called for (except the off-set to avoid crossing the river), and that the northwest corner was fixed at a point on the course called for in the grant at the end of the northwest corner so established, the surveyor did actually run out and trace with a chain on the course called for to the northeast corner, they must find for the defendant."

A similar prayer was before this court at the first hearing and considered, near end (pp. 606–7), and you said:

"The request, therefore, should have been that if the jury did not believe the hackberries (Bigham) were the same (as those named in the grant), then if they believed that the two lines were run according to the field-notes, they must find for the defendant."

It will be observed this prayer exactly adopts the modification directed by this court as necessary to make it properly and legally correct. The prayer thus modified was refused. Upon comparison it will also appear that the two stated cases charged by the judge as requiring a verdict for the plaintiff practically charge the reverse of this prayer.

Eighth Assignment of Error

relates to the refusal of the following prayer, to wit:

"It would not be proper to reverse the calls of the grant made to Maximo Moreno and to run in reverse course from the southeast corner for the purpose of ascertaining where the northeast corner would be found by the measurement called for in the grant if the evidence satisfies the jury that the surveyor actually began the survey at the corner called the beginning corner in the field-notes and from that corner ran and measured the western and northern lines on the ground."

Unquestionably this proposition was sound, for if the jury were satisfied that the survey was begun where the field-notes state, and where Johnson and Duty testify they began it, and if the jury were satisfied that from this corner the surveyor began and run the west and north lines on the ground, the law required the jury to begin at the same corner and follow the surveyor around those same lines, and if they failed to find monuments, etc., then to locate the grant by following the courses and distances. After the refusal of repeated prayers for a charge of the law involving this simple and well-recognized principle, the defendant asked for this one. It had become doubly important to avert the confusion involved in the stated cases under which the judge had instructed the jury to find for the plaintiff and authorized them to reverse the course of the surveyor's lines, as the testimony showed he had run them, and as his testimony had been verified by finding marked trees and marked lines fifty-seven years after he had run and marked them.

For all of these reasons we ask that the judgment be reversed and attention directed to the rules and principles governing the case, so explicitly laid down in the two opinions already rendered in this case. It is manifest that the map and notes of the Sawyer survey were insufficiently proven; and, if legally proven, they were incompetent under the general rules of evidence, which were clearly enunciated in the last opinion as applicable to the former deposition of the witness Johnson. It is manifest that the confusion and errors of the charge on the last hearing largely grew out of the erroneous admission of this incompetent testimony. With the Sawyer maps and notes out of the case, the testimony of Johnson and Duty is corroborated by the marked north line, found marked as they testified it was marked, and in the position it should be, corresponding with the west line, run as the grant and their testimony show it was run; corroborated also by the marked line found above the Bigham hackberries. With this testimony uncondradicted by this incompetent evidence, there will be less danger of error in the charge upon another trial.

WM. E. EARLE,
Attorney for Plaintiffs-in-Error.

Kellogg Building,
Washington, D. C.

Office Supreme Court U. S.
FILED.
OCT 13 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1890.

F. H. AYERS *et. al.*, Plaintiffs in Error,
vs.
A. E. WATSON, Defendant in Error.
No. 1,356.

MOTION TO ADVANCE.

Now come the plaintiffs in error, by their attorney, and inform the Court that this cause has twice heretofore been adjudicated by this Court upon the merits on writs of error brought by him, as will appear on reference to 113 U. S., 594, and 132 U. S., 394; wherefore, under the provisions of paragraph 4 of rule 26, they now move the Court—

That this cause be advanced, and such day be fixed for its hearing as to the Court shall seem just.

W. E. Earle

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 1 1890
JAMES H. McKENNEY,
Clerk

[Dec. 1, 1890.]

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

AYERS
vs.
WATSON.
No. 1,356.

Brief for Defendant in Error.

W. HALLETT PHILLIPS,
For Defendant in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

AYERS
vs.
WATSON. } No. 1,356.

Brief of W. Hallett Phillips for Defendant in Error.

The controversy is the same as stated in the opinion of this Court in *Ayres* vs. *Watson*, 113 U. S., 594.

STATEMENT.

This was an action of trespass to try title of certain land in Bell County, Texas, originally brought in the District court of said county by Watson, the defendant in error, against the plaintiff in error and one Anderson. The land claimed was described in the petition as a tract lying in said county of Bell, about fifteen miles northeast by north from the three forks of Little river, stating the boundaries. The defendants excepted to the petition for insufficiency of law, and also pleaded not guilty. One of them, Frank Ayers, pleaded specially that he was owner in fee simple of a tract of eleven leagues granted by the government of Coahuila and Texas to Maximo Moreno in the year 1833, describing its metes and bounds; and he

alleged that the land described in the plaintiff's petition and claimed by him under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, was embraced within the boundaries of said eleven-league grant, which was an elder and superior title.

By agreement of the parties, the patents or grants under which they respectively claimed, as set forth in the petition and answer, and their deraignment of title under the same, were admitted on the trial, and the controversy was reduced to the simple question of locating the surveys on the ground. The tract claimed by the plaintiff, Watson, was one-third of a league, patented to the heirs of Walter W. Daws, and its position was well ascertained and defined; and the question was, whether it was or was not embraced in the older survey of the eleven-league grant, owned by the defendant Ayers, which was described in the field notes of the grant, as follows, viz: 'situated on the left margin of the river San Andres, below the point where the creek called Lampassas enters said river on its opposite margin, and having the lines, limits, boundaries, and land marks following, to wit: Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a land-mark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 inches diameter and 15 varas to the south 34° west there is an elm 12 inches diameter; a line was run to the north 22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas, crossed a branch of the creek called Cow Creek, at

10,600 varas, crossed the principal branch of said creek, and at 12,580 varas two small hackberries served as land-mark for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in english 'box-elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 inches diameter. Thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven-leagues of land or 275 millions of square varas.'

This tract extended backward from the river, in a northerly direction, from twelve to fourteen miles, and, as that was about the distance from the river of the tract claimed by the plaintiff, the question was whether it embraced the latter. If it did, being held by an elder title, the defendant would be entitled to the verdict; if not, the plaintiff would be entitled to it. Under the concessions made by the parties, the burden of proof was devolved upon the defendant to show that this eleven-league tract extended so far back from the river as to embrace the plaintiff's land, or any part of it.

The evidence was that of surveyors and chain-bearers, and tended to show the following facts, namely, that, by commencing at the beginning point of the Moreno grant (the position of which was not disputed), and following the lines of the survey by courses and distances only, it would embrace nearly the whole of the Daws' patent; but run in this way, the lines would not coincide with

certain well ascertained monuments, either called for in the grant, or conceded to mark and identify the footsteps of the surveyor who originally located it in 1833. For example, the easterly line of the survey, which is identified by several miles of marked trees, and the southern terminus of which, at the river San Andres, is fixed by agreement of the parties and by monuments called for in the grant itself, is situated about 570 varas, or three-tenths of a mile, east of what its position would be if the courses and distances were followed; and, as fixed by such monuments, if the tract were made to extend as far back from the river as the defendant contends, it would contain fourteen or fifteen square leagues instead of eleven. But the point of greatest importance was to fix the position of the northern boundary line of the tract, to ascertain whether it took in or crossed the Daws' patent. This was a line described in the survey as running from the stake set in the prairie, south 70° east, 12,580 varas, or Mexican yards (about 6¾ miles), to two small hackberry trees. Of course, these hackberries marked the northern terminus of the eastern boundary line, before mentioned; which commenced from them; and two such trees, having all the old marks and blazes requisite, were found in said eastern boundary line (and were adopted as the northeast corner of the tract) in the course of an official survey, made by the order of the court in 1854, being at a distance of 26,960 varas from the river San Andres—the distance given in the field notes of the grant, based on calculation and not actual measurement, being 26,400 varas; whereas, by following the courses and distances men-

tioned in the grant, the easterly line, extended to the river, would be 30,760 varas in length, and, as before stated, would not coincide with the marked line conceded to be the easterly line as run at the original survey. If the northerly line of the Moreno tract should be located and fixed by taking for its eastern terminus the two hackberry trees referred to, it would not reach the plaintiff's land, but would pass south of it a full half of a mile. The defendant, Ayers, however, disputed the identity of these hackberry trees with those called for in the Moreno grant, and claimed that the grant extended a mile and a half, or more, farther north, which, indeed, it would do according to the length of the first course measured from the beginning corner; and he adduced testimony to show some marked trees north of the two hackberries, in the line of the eastern boundary, corresponding to his views, and some marks along the northerly or back line, claimed by him to be the true line.

The controversy, therefore, was substantially reduced to this alternative, namely: If the first line of the survey taken according to its course and distance should govern the position of the back line, the Moreno tract would include the greater part of the Daw's patent; but if the two hackberry trees, discovered in 1854, were to be regarded as identical with the trees referred to in the field notes of the survey for the northeast corner thereof, then they would fix the position of the back line, and the Moreno grant would not include any part of the Daw's patent.

ARGUMENT.

This case has been six times tried before a jury.

The first three trials resulted in disagreements. Subsequently there were three successive verdicts and judgments for the plaintiff, the defendant in error here.

There has never been but one question, and that of fact, to wit, the location on the ground of the northern line. This was largely dependent on the ascertainment of the monuments called for in the survey.

In the case reported in 113 U. S., *supra*, the judgment in favor of Watson was reversed, on the sole ground that the judge had directed the jury if they could not locate the disputed north line by any of the rules that had been laid down, they might make the location of the north line, so as to embrace within the boundaries eleven leagues—the extent of the defendant's grant.

In thus prescribing the rule of quantity, this court held there was error.

All the other exceptions were overruled.

The case was a second time brought here by the defendant and is reported as *Ayers* vs. *Watson*, 132 U. S., 394.

The judgment there, was also reversed on a single point, relating to the admission of a deposition, contradictory of the statements of a witness.

Ayres vs. *Watson*, 132 U. S. 394.

The case is now here for a third time and the plaintiff seeks the reversal of the third and last judgment rendered in favor of the present defendant in error.

The issue is the same as was tried at the former trials. The evidence is now given more at large, and is fuller, especially as regards the eastern line.

The question as to the boundary lines of the Moreno grant held by the plaintiff in error, has been frequently before the supreme court of Texas.*

These decisions are in perfect harmony with the rulings of the Court below, now complained of.

We submit that the question at issue was fairly left to the jury, and that the errors assigned are unsustainable.

The portions of the charge excepted to can be best understood by considering the charge as a whole. The portions excepted to are italicized.

Charge.

"By the admission of the defendant, the plaintiff is entitled to recover, unless the Maximo Moreno eleven-league grant extends over all or a part of the Daws' one-third of a league. The defendant assumes the burden of showing that the eleven-league grant does embrace a portion of the land patented to Daws, and owned by plaintiff. There is no question as to the validity of the title, except so far as it may be affected by a conflict of boundaries. *There is no dispute between the parties as to the extent of the front upon the Little river (St. Andres), both the corners on*

Phillips vs. *Ayres*, 45 Texas, 601.
Ayres vs. *Harris*, 64 Id., 296.
Ayres vs. *Lancaster*, 64 Id., 305.
Scott vs. *Pettigrew*, 72 Id., 328.
Loncaster vs. *Ayres*, 72 Id.
Ayres vs. *Harris*, 77 Id., 108.

the river being clearly ascertained and accepted by the parties; nor is there any question that the eastern line of said grant was clearly marked, and is now certainly well-known to have been run and actually marked for the distance of 26,000 *or* 27,000 *varas, crossing Cow Creek (now called Big Elm) at a given distance from the Little river, mentioned in the original field notes, and found to correspond with the actual distance between those streams on said line.*

"The original field notes do not call for any landmarks at the intersection of the western line with the back or north line of the survey. At the intersection of the back line with the eastern line two small hackberries are mentioned as serving for a landmark to designate the corner.

"Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground, with reasonable certainty, and where he cannot be tracked on the ground, we have to follow the courses and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field notes of the survey, and that marked trees designating a corner or a line on the ground shall control both course and distance. *In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground, the corner called for in the grant as the 'beginning' corner, does not control any more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field notes there recorded, but are permitted to reverse*

the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most harmonize all the calls and the objects of the grant.

"There has been proof given you tending to show where the two small hackberries, called for as the intersection of the eastern and northern lines of the grant actually stood at a distance from the lower corner of the river, corresponding to the length of the eastern line of said grant; and if the proof satisfies you that the two hackberries, mentioned in the testimony of the witnesses, Sam and Pat. Bigham, are the hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood, N. 70, W., until it intersects the western line of said grant will bound the eleven-league grant on the north, and if the Daws' one-third of a league is situated wholly north of this line it does not conflict with said eleven-league grant, and you will find for the plaintiff.

"*If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began the survey at the "cotton wood" corner (the SE. corner) and marked and measured the east line, and did not actually trace and measure the west line of the said grant, you should follow these footsteps of the surveyor, and from the point where you find his foot steps stop, (for it is not disputed that this line is*

marked to a greater distance than the distance called for in the grant, as the length of this line)—from this point where you find the footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line; and if this line so run will fall wholly south of the Daws survey, you will find for the plaintiff.

"If from the proof you are not able to fix the place where the two hackberries, called for in the grant as a landmark to designate the northeast corner of the Moreno grant, then stood and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the foot prints left by the surveyor, you will fix the lines of the Moreno grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line, extended on its course to the point of intersection with the extended second or north line; and if the north line so fixed will embrace in the Moreno grant any part of the Daws' survey you will find for the defendant." (R., 38.)

The charge is in accordance with the ruling of this Court in *Ayres* vs. *Watson*, 113 U. S., where it is said, the jury should have been told, that if the testimony was not sufficient to identify the two hackberries with those called for in the grant, *and could not fix the northeast corner nor the back line by any other marks* or monuments, then they should fix it by the courses and distances of the first and second lines of the survey. (113 U. S., 607).

In the same case, the court approves the general

rule governing surveys laid down by the court below, as to the prime importance, in order to identify the actual survey, of following the footsteps of the surveyor, so far as they could be discovered on the ground, and the further general rule, that marked lines control courses and distances.

Exception is made that the charge assumes as a fact that the eastern line of the Moreno grant runs from the lower river corner, crossing Cow Creek (now called Big Elm), at a distance stated by the court, which it is claimed is a question of fact for the jury.

The materiality of this exception is not apparent, and the statement of the court was made solely for the purpose of eliminating from the case, matters which the record shows, were admitted by both parties or not denied.

It is objected that the court should not have told the jury that the beginning corner did not control more than any other corner, in following the tracks of the surveyor, in order to fix the boundaries of the survey; that it was error to charge that in order to harmonize all the calls of the survey, they were permitted to reverse the calls and trace the lines the other way.

The objection is that these rules are not applicable to the case.

In reference to a similar charge given as to the same grant here involved, the Supreme Court of Texas say:

"We understand the rule laid down in this charge to be the law, and to furnish ordinarily a safeguard to ascertain the locality of the boundary lines which

are in dispute. * * * The object of all rules which have been formulated by the courts for locating, fixing and determining boundaries, has been to ascertain and discover, if possible, the footsteps of the surveyor, and in this way identify the survey that was actually made, and it is apparent that a charge which prescribes such a rule for the conduct of the jury can lead to no mischievous results."

Ayres vs. *Harris*, 64 Tex., 300.

The court further declared, that it had always been the rule in Texas, that the jury could fix the disputed lines of a survey in subordination to the general rules, as in their judgment would most nearly harmonize the calls with the known corners and marked lines.

The court reversed the judgment on the ground on which this court reversed the judgment in *Ayres* vs. *Watson*,—the court below having directed the jury to ascertain the boundaries of the grant, by the rule of quantity.

The remarks of Mr. Justice BRADLEY, are referred to with approbation.

In *Phillips* vs. *Ayres*, the rule adopted as applicable to the case is:

"The beginning corner in the survey is of no higher dignity or importance than any other corner of the survey. The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. The construction is to prevail which is most against the party claiming under the uncertain survey. It is his duty to show and establish his corners. From which it will follow, that he who sets up and relies

on an outstanding claim must show that it embraces the land in contest, and should not succeed by using it when it is uncertain whether it embraces it or not.'"

Phillips vs. *Ayres*, 45 Tex., 607.

These rules are again affirmed by the same court in *Scott* vs. *Pettigrew*, which also involved the Moreno grant.

The court there held that if the jury "could not determine from the evidence the locality of either the northwest or the northeast corner, and they could not from testimony fix the north or back line by any other marks or monuments, then they should have been permitted by the charge to locate the north or back line from either or both of the two identified corners on the river, under the guidance of all the evidence and connecting circumstance, including the question of area."

Scott vs. *Pettigrew*, 72 Tex. 328.

The question coming up anew was decided in a similar way in *Lancaster* vs. *Ayres*, 72 Texas.

The remaining exception to the charge is to that part where the jury are told, that if the hackberries were not identified, and if the proof satisfied them that the surveyor began at the southeast corner and marked and measured the east line, and did not actually trace and measure the west line, they should follow the footsteps of the surveyor, and from where his footsteps stopped they were to run the northern line.

The objection to this charge is, that there was no proof to show that the surveyor began the survey at the southeast corner, and because the court erred in

directing the minds of the jury to that corner rather than any other corner. (R., 40).

We submit that this portion of the charge is not open to the criticism made.

The judge had already told the jury that one corner was not to govern more than another.

To this exception was taken.

The exception we are now considering is that the court erred in directing the minds of the jury to the southeast corner rather than any other corner.

These exceptions are somewhat conflicting.

The charge was but in accordance with the rule previously announced, to the effect, that the jury should follow the marks of the surveyor wherever they could be found.

It was conceded that the eastern line was marked from the southeast corner up to the hackberries, where the plaintiffs assert the northeast corner was established.

The defendant claimed there were marked trees on the eastern line extending beyond the hackberry corner, and that such trees had been marked by the surveyor at the same time as those below the hackberries.

This contention was denied by the plaintiff. If it was as asserted, that fact would tend to establish the northern line, as claimed by the defendant.

It was not pretended that any marks were found on the western line, nor was it claimed that the northern line, asserted by defendant, was found to be a marked line.

The court properly called the attention of the jury to the eastern line, following the rule approved by

this court in *Ayres* vs. *Watson*, that marked lines control courses and distances.

113 U. S., 605.

The question of fact as to where the marks on the eastern line terminated, was left to the jury to decide from the evidence.

The charge was as favorable to the defendant as he had a right to ask.

There was testimony of surveyors tending to show that Johnson the surveyor of the Moreno grant could not have run the survey as claimed by the defendant in the order mentioned in the field notes. It was for the jury to decide this question on the evidence.(R., 24, 25, 26.)

Moreover, the corner at which the surveyor commenced, was immaterial. If the tracks he left on the east line were so plain, that all the calls of the grant could be most nearly reconciled with the corners and lines that were established, by starting from the southeast corner, and following such tracks, the court was justified in so charging the jury.

This in effect the court did.

The charge in this particular, as in others is sustained by the supreme court of Texas in a very clear opinion by Henry, J., the most recent announcement of the supreme court on the subject. (*Ayres* vs. *Harris*, 77 Tex., 108.)

Passing from the charge to the instructions requested by the defendant below and refused, it will be noticed that most of them were correctly denied, because they either embraced what had already been correctly explained to the jury, or contained propositions contrary to the general charge of the court.

There was an objection made to the admission in evidence of the field-book of the surveyor, Johnson,

containing notes of the survey for Sawyer, of the Moreno grant in 1833, and the refusal to exclude such evidence constitute exceptions two and five.

It appears from the evidence that the field-book was made by Johnson and deposited by him among the records of the Texas Land Office, where it has always been considered as an archive. A similar book was held admissible in evidence, and for a like purpose, in *Cook* vs. *Dennis*, 61 Tex., 248.

The Court in *Ayres* vs. *Harris*, *supra*, say, that even if it could not strictly be considered as an archive, it was clearly proved to be a memorandum of the survey made by the surveyor at the time the work was done. As such it was clearly admissible to aid in proving the actual footsteps of the surveyor when making the survey. The evidence was admissible on the same principal as declarations of a surveyor.

Say the court, "the only difference between the field-notes taken from the field book and those contained in the title is, with regard to the number and distances of some of the objects called for,—and we think the notes contained in the field-book could not have any other tendency than to aid in showing where the north line of the Moreno survey was actually placed by the surveyor."

Ayres vs. *Harris*, *supra*.

This court has sanctioned, as admissible in such a case, evidence of less weight than that objected to, such as a junior survey, upon the ground that such evidence was legitimate, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey. (*Clement* vs. *Parker*, 125 U. S., 333.

The fourth exception, contains a prayer, which was framed to direct the minds of the jury, to blazes alleged to extend along the eastern line and above the hackberry corner, to the northeast corner, as claimed by the defendant.

It was properly refused, because the court had already submitted the question to the jury.

As to this and other instructions refused, it is sufficient to say, as has been frequently declared by this court, that if, in regard to any particular subject or point pertinent to the case, the court laid down the law correctly and so fully as to cover all that it was proper to be said, it was not bound to repeat this instruction in terms varied to suit the wishes of either party.

If the charge of the judge made at his own suggestion, covers the point in question, it is more likely to be important and correctly stated than by counsel.

The same observations are applicable to the sixth and seventh exceptions.

The court was asked to charge, that if the northeast corner was not identified by the hackberries, or other monuments, they should fix it by the courses and distances of the first and second lines of the survey.

Upon similar prayers the Supreme Court of Texas say:

"In so far as the charges requested and refused contain correct propositions, we think their substance had been sufficiently given, and that giving them would have tended to confuse, rather than enlighten or aid the jury. The rules of law applicable to boundaries generally, and to this grant in particu-

lar, have been expounded not less than five times by this court, and once by the Supreme Court of the United States, and have been correspondingly charged in the trial courts. The evidence of the same witnesses, as well as of different witnesses, has been found contradictory; and the true position of the boundaries of the grant, with all the light that can be cast upon them by the law or the evidence, remain obscure. The facts were such that the law did not permit the result to be controlled by a charge of the court. Beyond giving the jury to intelligently understand that it was their duty to ascertain the boundaries by following the footsteps of the surveyor, we think the result of the trial tends to demonstrate that the jury could not be materially aided by the charge of the court. That much and more was correctly done in this case, and we think the charges asked were correctly refused." *Ayres* vs. *Harris*, *supra*.

The charge that the court gave, made it proper to refuse the prayer, contained in the ninth exception.

The court had told the jury that if they were not able to fix the place where the two hackberries, called for in the grant as land-marks to designate the northeast corner stood, and if the proof did not satisfy them, that to reverse the calls and trace the line the other way would most nearly harmonize all the calls with the footprints of the surveyor, they should fix the boundaries of the Moreno grant by the course and distance of the first and second lines of the survey. (R., 39.)

There was no exception to this part of the charge.

The court properly refused the instruction that it would not be right to reverse the calls in order to ascertain the northeast corner, if it was found that

the surveyor actually began the survey at the corner called for in the field notes.

Moreover, such prayer was contrary to that portion of the charge already considered, where the jury were informed that the "beginning" corner did not control more than any other corner.

The reference we have made to the Texas decisions suggests the question of their authority in the present controversy.

It would seem that they must be accepted as obligatory.

We here have a case of a large grant of land, the boundaries of which are disputed.

Many co-terminous titles, as shown by the reports, depend upon their ascertainment.

It is a matter of general and public nature in which the community is interested.

In such a case, the determinations of the highest court of the State, laying down the rules applicable to the grant, ought, as a matter of right, be regarded by the federal courts as conclusive whenever similar questions arise. Where the rules of real property are settled by the State courts, the same rules will be applied by this court.

This, say the court, in *Jackson* vs. *Chew*, is a principle so obviously just, and so indispensably necessary under our system of government that it cannot be lost sight of.

Jackson vs. *Chew*, 12 Wheat., 162.

In that case and in *Henderson* vs. *Griffin*, 5 Pet., 154, the construction of a will was involved, and the construction by the State court was held conclusive.

But whether or not the decisions of the State court, as to the delimination of the grant are conclusive, it is certain that any general rules announced, governing titles and surveys of land within the State, will be followed.

The declarations of the State court in the various cases to which we have referred, do not simply announce the rules governing the survey in question. They assert the general law of Texas governing surveys of land within the State. As such they constitute a rule of decision.

If the State decisions are not obligatory, this court will adopt them in the interest of harmony and uniformity of law.

It would be most unfortunate if the Federal courts should adopt different rules of construction of this long litigated grant, from those enforced in so many decisions by the Supreme Court of the State, where the grant is located.

We are satisfied, that the State decisions will commend themselves to this Court as sound and convincing.

On the whole case, we submit that the judgment should be affirmed.

W. HALLETT PHILLIPS,
For Defendant in Error.